IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 58 OF 2020

In the matter of the estate of the Late

BERTHA GODFREY MASANGU.. DECEASED

In the matter of application for probate or letters of administration

Between

GRACE GODFREY MASANGU...PETITIONER

And

DANIEL PAUL MALALE ....CAVEATOR

JUDGMENT

16/5/2022 & 31/5/2022

I.C. MUGETA, J

The deceased and the caveator were husband and wife. Their Christian marriage was blessed with one issue, namely; Denis Daniel Malale. The deceased left a will which is subject of the caveat proceedings. The will appointed the petitioner as its executrix. The caveator disputes the validity of the will. Pursuant to the caveat being filed, two issues were framed for determination. These are:

i. Whether the deceased left a valid will.

ii. If there is no valid will, who should administer the deceased's estate?

The brief facts of the case are as hereunder:

The petitioner brought four witnesses to prove that the will is valid. She testified as PW2. Other witnesses are Peter Moris Kimwangano (PW1), Mariam Asajile Mwakangale (PW3) and Mutamwega Bhatt Mgahwa (PW4). Peter Kimwangano is the headteacher of Ndugumbi Primary School, Kinondoni – Dar es Salaam where the deceased worked as a teacher. He testified that the deceased gave him a will and instructed him to read it to the family meeting after her funeral. As the deceased was buried in Shinyanga and he was unable to attend, he gave the same to Salma Bakari who attended. However, he testified, Salma brought it back for a reason that the family meeting was not convened. Grace Godfrey Masangu (the petitioner) is the deceased's sister. She testified that she petitioned for probate because the will appoints her as executrix. She tendered it as exhibit P2 and the registration card for the motor vehicle T.604 DSV, Toyota IST as exhibit P1. Mariam Asajile Mwakangale and Mutamwega Mgahwa attested the will as witnesses and each of them got a copy thereof for custody. Both of them identified the will (exhibit P2) in court as the document they attested.

The caveator testified as DW1. He contested the will because firstly, it distributed matrimonial assets. Secondly, it was not sealed by the time it was read at the family meeting in Shinyanga. Thirdly, it was not signed on each page by the testator and the witnesses, therefore, it might have been altered. He disputed the statement in the will that he did not care for the deceased during her sickness. He tendered the marriage certificate as exhibit D1, the birth certificate of their son as exhibit D2, the death certificate as exhibit D3, the letter by Peter Kimwangano (PW1) summoning him to attend the reading of the will at Ndugumbi Primary School as exhibit P4, the deceased hospital discharge forms as exhibits P5 and P6 and the minutes of the family meeting held at Ibadakuli – Shinyanga as exhibit P7.

The caveator brought two witnesses to support his case. These are Charles Bujiku, (DW2) and Victoris Linus Silayo (DW3). Their evidence is similar in all material particulars. Essentially, they testified that the caveator and the deceased lived in harmony and when the deceased was sick, he cared for her including attending her when she was admitted to hospital. In addition, Charles Bujiku testified that he chaired the family meeting held in Shinyanga on 11/7/2020 where the unsealed will was read.

After trial the parties filed final written submissions. Alphonce Katemi, advocate for the caveator reiterated the arguments of the caveator in his

evidence regarding the validity of the will. He submitted that the will is invalid for several reasons including that none of the witness to it is a relative of the deceased as required by The Local Customary Law (Declaration) (No.4) Order, 1963, G.N. 436 of 1963. He cited the case of **Straton Patrice Ndakidemi v. Margreth Ndakidemi and 4 others,** Probate and administration cause No. 4 of 2019, High Court – Dar es Salaam Registry (unreported) to buttress his argument. The other reasons advanced by the learned counsel are that the will might have been tempered with as it went through the hands of many people unsealed, that the matrimonial assets were bequeathed without consent of the other party and that the caveator has been disinherited for no valid reasons.

On her part, Irene Maira, advocate for the petitioner supported the will as valid for containing the necessary ingredients of a will as per S.50 (iii) of the Indian Succession Act, 1865. That it is signed by the testator and two witnesses and was executed by a person with capacity to make a will without undue influence. She argued further that as the testator was of sound mind, under section 46 of the Indian succession Act, 1865 she had the right to dispose of her properties by will as she wished.

In determining this case, I shall start with the first issue by discussing matters raised by the parties in evidence and counsel's submissions. As at

this stage the role of the court is to appoint the administrator, I shall confine myself to evidence relating to the validity of the will and proceed to appoint the executor or administrator.

According to the petition, the deceased was a Christian. Therefore, the will she wrote is governed by the provisions of the Indian succession Act, 1865. For such a will to be valid, as submitted by Irene Maira for the petitioner, it has to comply with section 50 (iii) of that Act as far as witnesses and attestation is concerned. That law requires the will to be signed by the testator in the presence of two or more witnesses who also shall sign the will. In this case, the testator signed the will in the presence of Mutamwega Mgahwa (PW4) and Mariam Asajile Mwakangale (PW3). Therefore, it meets the conditions of a valid will as far as attestation is concern.

Counsel for the caveator has challenged the attestation for a reason that none of the witnesses is a relative of the deceased as required by the Local Customary Law (Declaration) (No. 4) Order, 1963, GN. No 436 of 1963 and the decision in the case of Straton Ndakidemi case (supra).

With respect the cited Order does not apply to this case. The said Order applies to estate dealt with under customary law not estate governed by other laws. The deceased in this case was a Christian, therefore, her estate

falls under the Indian Succession Act, 1865. The Ndakidemi's case is distinguishable because the decision therein was based on customary law. Even if in the petition it was stated that Albert Ndakidemi was a Christian, his life style, per the evidence, proved the contrary. Albert left surviving him nine children sired with five different women to whom he was not married. This life style is typical of a traditional African man. That is why the will of Albert Ndakidemi was considered under customary law under the said Order.

Another complaint by counsel for the caveator is the possibility of the will being altered/forged after passing into hands of many people being open and unsigned on each page. According to the testimony of Mariamu Asajile Mwakangale (PW3) and Mutamwega Bhatt Mgahwa (PW4), who witnessed the will, the same was made in three copies. The deceased took one copy and each of them took a copy too. Peter Moris Kimwangano testified that the deceased gave him a sealed copy of the will on instruction that he should read it at the family meeting after her burial. The evidence of both parties is clear that the deceased died on 7th April, 2020 as proved by exhibit D3 (the death certificate). She was buried at Ibadakuli, Shinyanga on 10/04/2020. Peter Kimwangano did not travel to Shinyanga. He testified that he gave the will to Mwalimu Salma Bakari to read it after the burial. Salma brought back the will and told him that the will was not read because the meeting was not

convened. Salma did not testify. Therefore, Kimwangano's evidence as to why the will was not read is hearsay. Mariam Asajile who had another copy of the will was present at the meeting in Shinyanga. She testified that she did not report that she has the will because the caveator told the meeting that issues involving the estate shall be discussed after 90 days as he was still grieving.

According to the undisputed evidence of Peter Kimwangano, on coming back to Dar es Salaam the caveator unsuccessfully tried to get the will from him. That upon being denied access to the will, the caveator complained to the Kinondoni Municipal Council Education Officer who ordered Kimwangano to convene the family meeting to read the will. In compliance, he summoned the caveator and members of the deceased family on 1/5/2020. However, the caveator boycotted this meeting. His demand was to be given the will not the same to be read over to him. On that account, Peter Kimwangano read the will and gave it to Victor Masangu (the deceased's brother). Finally, according to Grace Masangu (PW2), Daniel Paul Malale (DW1) and Charles Bujiku (DW2) the will was read on 11/07/2020 in Shinyanga at meeting convened by the caveator. The period between 1/5/2020 and 11/7/2020 when Victor Masangu and others had custody of the unsealed will founds the complaint by the caveator that the will might have been tempered with.

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Indeed, that is possible. However, courts of law do not decide cases on the basis of theories of possibilities but on facts proving each and every allegation on the balance of probabilities (in civil cases) and beyond reasonable doubts (in criminal cases). In this case, the caveator has not tendered any evidence to prove that the will is forged. To the contrary, the petitioner has tendered the original will while Mariam Asajile and Mutamwega Mgahwa, the witnesses to the will, identified it in court as genuine copy of the document they signed.

Altering documents with ill motive is a crime called forgery. In the case of **Omary Yusuph vs. R.A. Abdulkadr** [1987] TLR 169 it was held that when forgery is alleged in civil cases it is not a matter of stating it without concrete proof. It must be proved on a higher standard of proof. The Court of Appeal held:

> '...*when the question whether someone has committed a crime is raised in civil proceedings that allegation need be established on a higher degree of probability than that which is required in ordinary civil cases...*'

In this case, the allegation is not proved even on the balance of probabilities.

The caveator's counsel has further challenged the will on two other grounds. Firstly, that it distributes matrimonial properties jointly acquired by the

deceased and the caveator. Secondly, that the caveator was disinherited unreasonably since the reason given to disinherit him, namely; that he did not take care of her is untrue. In his view, consent of the other spouse is required for one to bequeath a matrimonial property. On taking care of the deceased, the learned counsel has submitted that the husband took care of her and that is why in the discharge forms after the two surgery the deceased recorded him as her next of kin as proved by those forms which were tendered as exhibits D5 and D6. I shall start with the issue whether the deceased disposed of matrimonial assets by a will.

I wish to state that matrimonial and probate and administration causes are two different case regimes. Admittedly, in some instances, they are interrelated and interdependent. In matrimonial proceedings, when the issue is whether a property registered in one spouse's name is matrimonial property, it may be so declared if it is proved that the parties intended to have community ownership of properties. In such cases, the court considers the extent of contribution towards its acquisition or improvement by the other spouse. This is not the case in probate and administration causes. When the person in whose name the property is registered dies, such property forms part of the deceased's estate and no claim based on matrimony can be maintained against that property except where at the time

of death there was already in court a matrimonial dispute for divorce or separation.

In this case, the deceased bequeathed, in exclusion of the caveator, two properties which are in her name. These are the employment benefits under the pension scheme and a motor vehicle T.604 DSV, Toyota IST. The car is bequeathed to the son. The pension funds are bequeathed to her son and her parents. The caveator is allocated Tshs. 30,000/= only. If this was a matrimonial dispute, the call upon me to decide whether the two properties are matrimonial assets would have been justified. However, this is a probate issue and since the properties are in the name of the deceased, I have no doubt that they form part of the deceased's estate. Therefore, under section 46 of the Indian succession Act 1865, as rightly argued by Irene Maira, the deceased was entitled to dispose of the same as she wished.

Has the caveator been disinherited?

Technically, indeed, the caveator is disinherited to the pension which is divided at 70:15:15 among the son, the father and the mother of the deceased respectively. The will does not explain the source of Tshs. 30,000/= after division based on the stated ration. This misnomer, however,

by itself, does not invalidated the will. The executrix can find means out of the estate to give effect the wish of the deceased.

The caveator disputes the statement in the will that he did not care for the deceased and he supported his side of the story that he cared for the deceased by bringing two witnesses who testified that the deceased and her husband lived a happy life and the husband visited the deceased when she was admitted to the hospital. The petitioner and her witnesses, on their part tried to prove that the caveator cared less for the deceased during her cancer ailments.

As the deceased is not here to give her part of the story and there is no evidence that she was of unsound mind or was influenced when she made the will, her wishes must be respected. She bequeathed in exclusion of the caveator properties that are in her name only. The rest of the properties, namely; the matrimonial house and the household belongings she bequeathed to her son her shares only without touching the caveator's shares as indicated in part 3(b) (i) and (ii) of the will. Be as it may, it is lawful for a spouse to bequeath by will her share in any matrimonial assets. That bequeath, however, can be invalidated upon proof that the deceased had no share in the properties or, in case of land that he was a tenant in common. The caveator has not proved any of them regarding the properties which are

not in the sole name of the deceased. Consequently, I hold that for the properties which are not registered in the name of the deceased, the bequeath is limited to her share in those properties and on that account, it cannot be said that she acted irrationally. To conclude, her will cannot be invalidated for displeasing the caveator/husband. In the fine, I find that the will is valid. The first issue is answered in the positive. The caveat is dismissed for want of merits.

Since the will is valid, the executor mentioned is entitled to administer the estate. To answer the second issue, I hereby appoint Grace Godfrey Masangu as executrix of the will of the late Bertha Masangu.

I.C. MUGETA

JUDGE

31/05/2022

Court: Judgment delivered in chambers in the presence of Alphonce Katemi, advocate, for the caveator who is present also holding brief of Irene Maira, advocate, for the petitioner who is absent.

Sgd: I.C. MUGETA

JUDGE

31/05/2022