

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(TEMEKE HIGH COURT SUB-REGISTRY)**  
**(ONE STOP JUDICIAL CENTRE)**

**AT TEMEKE**

**PROBATE AND ADMINISTRATION CAUSE NO. 16 OF 2021**

In the matter of the estate of the late

**PROJEST ALOYCE RUGAZIA..... DECEASED**

**BETWEEN**

In the matter of an application for probate by

**PARFECTUS RUTEGANYA.....PETITIONER**

**AND**

In the matter of a caveat by

**ALLEN RUTATEKURURWA RUGAZIA.....CAVEATOR**

**JUDGMENT**

*15/07/2022 & 13/09/2022*

**I.C. MUGETA, J**

The late Projest Aloyce Rugazia died on 4/08/2019. He left a will appointing the petitioner its executor. Surviving him are his wife, Judith Kokumanya Rugazia, Allen Rutatekururwa Rugazia (son) and Stephen (Aloyce) Rwehabura Rugazia (son). The caveator has challenged the will mainly on ground, among others, that the deceased did not make any will because mentally he had no capacity to make one. He is represented by Odhiambo

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Kobas assisted by Halfani Daimu, learned advocates while the petitioner is represented by Eustace Rwebangira learned counsel. The court framed two issues for determination.

- i. Whether the deceased left a valid will.
- ii. If the first issue answered in the negative, who should be appointed to administer the deceased's estate.

The petitioner brought six witnesses (including himself) to testify in support of his petition. These are Thomas Bashite Mihayo (PW1), Khalid Salum Karwani (PW2), Judith Rugazia (PW3), Perfectus Ruteganya (PW4), Deogratius Oswald Rugazia (PW5) and Joseph Ishengoma Rutabingwa (PW6). Thomas Bashite Mihayo and Khalid Salum Karwani attested the will while Joseph Ishengoma authored it. The signing and attestation of the will was done on 12/07/2019. It was tendered and admitted as exhibit P1. The general theme of the petitioner's side evidence is that all along up to the time of his death the deceased was of sound mind. The witnesses to the will and its drafter testified that during the period of preparation which took about six months to the signing of the will the deceased was mentally stable despite being sick of liver cancer. That none of them exerted undue influence to the testator to make the will in the manner it is.

The caveator testified for himself and he summoned one witness, namely, Williana Rugazia who is the deceased's uterine sister. The caveator testified, which evidence is admitted by both the petitioner and his witness, that during his sickness at one point in time, the deceased went to India for treatment. The testimony of the caveator's side which is inconsistent with that of the petitioner's side is that when the deceased came from his treatment the drugs prescribed caused him temporary loss of memory after their consumption. He specified that those are the drugs he took on Monday and Friday. Therefore, the caveator testified, since the will was made on Friday, the testator was of unsound mind and under the influence of his wife and friends.

After closing the trial, both learned counsel filed final written submissions. Odhiambo Kobas submitted that if it is established that the deceased had no capacity to make the will freely or was influenced to make the testamentary, the will should be declared invalid. I agree with him because that is the law. However, I do not agree with him that in terms of section 115 of the Evidence Act [Cap 6 R.E 2019] it is upon the petitioner to prove that the deceased was always of sound mind by tendering a medical report on the mental state of the deceased. In this case it is the caveator who alleges that the deceased temporarily became of unsound mind after taking a particular type of drugs,



he was depressed and had lost hope at the time of making the will. These facts are specially within his knowledge as the petitioners all along denies them. On tendering medical report on mental state of the deceased, there is no evidence from either the petitioner or the caveator that there is such a report. It is upon the caveator to prove those allegations. The burden of proof usually lies on who alleges.

Further, Mr. Kobas has called upon me to draw adverse inference against the petitioner for not calling the deceased's house girl to testify on his mental state. I am not convinced with this argument. The petitioner has no duty to prove that the deceased was of sound mind. It is upon the caveator to prove that he was of unsound mind which is a fact in issue alleged by the caveator.

For the foregoing, I shall determine the mental capacity of the testator before addressing others complaints with a view of determining the first issue.

The caveator's evidence is that the will was made when the deceased was terminally ill, having lost hope and taking drugs which disabled his mental capacity to make rational decisions. That those stressors and pressure from friends and his wife influenced his making the terms of his will which are not in favour of the caveator.



The examples the caveator made on the deceased's mental disorder is when he mistook the kitchen for a toilet, mixed his name with that of his brother Aloyce Rwehabura or demanded re-explanation of something already explained.

Williana Rugazia (DW2) said she believed if the will was that of his brother, he would not have denied her a share in his estate because they were best friends. This witness is astonished by the fact that the will bequeaths a better part of the estate to the wife who was not in good terms with the deceased. To prove her allegation she said at one point in time the deceased told her about disliking his wife in these words:

*'Bora nikalale kwenye mashine ya kusaga na kukoboa kuliko kuishi na kulala na yule mwanamke.'*

Considering this fact, Williana believes the will was influenced by the wife. The caveator holds the same view believing that he was entitled among other things to a plot at Mbweni which the deceased had promised to give him on the date of his marriage. However, it is bequeathed to the wife by the will.

Per the decision in **Goodluck Kyando V. the R, [2002]** TLR 362, the caveator and his witness are entitled to credence on their respective testimony. However, the credibility of such evidence must be tested against

the other pieces of evidence on record on each material particular. Specifically, against the evidence of the petitioner's side.

It is the evidence of Thomas Bashite Mihayo that the deceased was his friend and was of sound mind up to his death. That on 12/07/2019, the deceased phoned him to go to his residence and on arrival he was requested to attest the will. That he found the deceased fine and in good sense. Similar evidence came from Khalid Salum Karwani who also attested the will and Joseph Rutabingwa who drafted the will. These witnesses are aged 76, 64 and 66 respectively.

Except for Joseph Rutabingwa who was the best man when the deceased married his wife, there is no evidence on record to the effect that Thomas Mihayo and Khalid Karwani had any special relationship with Judith (the wife). While the caveator testified that these witnesses were inclined to serve the interest of the wife, I find this assertion as unfounded. It is my view that they gave testimony in court as free agents with no interests to serve. That interest, if any, has not been proved by the caveator. To the contrary, it is my view that the caveator has interests to serve as he feels denied his appropriate share in the will. In that regard, the probability for him to tell lies is higher than the three senior citizens combined. Consequently, I find

the evidence than that of the caveator of Thomas Bashite Mihayo, Khalid Salum Karwani and Joseph Rutabingwa credible than that of the caveator on the fact that the deceased was of sound mind, when he signed the will. The complaints that the deceased was of unsound mind, depressed and having lost hope at the time of signing the will have no merits.

Did the deceased take insanity inducing drugs as medication? This story comes from the caveator only and I find it to be false. The caveator testified that the deceased would lose consciousness for almost eight hours immediately after taking them. As he said, on the date when the will was made, he had given him the drugs in the morning. Thomas Mihayo testified that he received the call from the deceased summoning him to go and sign the will at around 11:00 hours. On arrival he found the deceased fine. Khalid Karwani and Joseph Rutabingwa said the same thing. Since I have held that the said witnesses are credible than the caveator, then the allegation that the deceased took drugs which impaired his mental faculties is highly improbable. Mistaking the kitchen for a toilet or mixing names of one's children is not evidence of insanity. It is a common feature of senility. According to the death certificate (exhibit P.3), the deceased was aged 65 years having retired from the civil service as a judge of the High court. In

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the event, I hold that the deceased had the capacity to make the will as there is no evidence of mental incapacity on his part.

The caveator has challenged the will on several other complaints including that he has been disinherited. I find this statement as untrue. He has his share under clauses C(i), C(vii) C(ix), C(x) and C(xi). He is just dissatisfied with the share given to him. In any views being given lesser than other heirs in the will is not a reason to invalidate the will.

The other complaints are that the will is not endorsed on each page, the signature of the testator is forged, the name Aloyce in the will is not of the deceased, the caveator was denied a copy of the will by Rutabingwa and that the deceased was influenced by his wife and friends to make unfair distribution of his estate. I shall deal with each of these complaints.

On the signature difference, the caveator attempted to prove the signature difference when he was in the witness box. However, he failed to show meaningful differences. His allegation is that the signatures in exhibits P1, P4 and P5 have different strokes on the formation of letter "u" in the name Rugazia. However, upon examination of the letter formation on signatures in the said exhibits when the caveator testified, it was agreed by both parties and the court that the signatures have similar strokes. The only difference

was on the underline which in exhibit P1 is somewhat far down the signature while on the marriage certificate which was put to the caveator on cross examination it is completely missing. I find the complaint on a signature being forged unproved. The difference in the signatures is insignificant.

On the names Aloys and Aloyce it is my finding that the deceased used them interchangeably. For example, while in exhibit P4 which is the title deed for the plot at Mbweni JKT the name Aloyce is used, in exhibit P3 (the death certificate) the name Aloys was used.

The complaint of failure to endorse each page of the will has no merits too. While it is a good practice to do so, failure to comply does not render a will invalid. Further, the caveator testified that the contents of the will (exhibit P1) are the same as the one which was read during the family meeting on 01/09/2019, the minutes of which was admitted as exhibit P2.

On the testator being influenced by his wife and friends, this is theory of possibility which is highly improbable. The wife and the deceased's friends, all denied to have influence the terms of the will to the advantage of the wife. The wife testified and no evidence to the contrary was tendered, that she was not aware of the will until when PW6 told her for the first time about it during the funeral in Bukoba. Thomas Bashite Mihayo and Khalid Karwani



testified, that they signed the will without reading its contents. Thomas Mihayo conceded he advised the deceased to make the will but he never discussed its contents with the deceased.

Mr Kobas has argued that the will is invalid because it was not read to the deceased before he signed it. However, Mr. Rutabingwa testified that he prepared the will on the deceased's instruction until when they agreed on the final draft. This means the testator was aware of the contents. There is no law which requires that the will should be read to the testator in the presence of the witnesses before all sign it. The allegation of the will being made under influence is unproved.

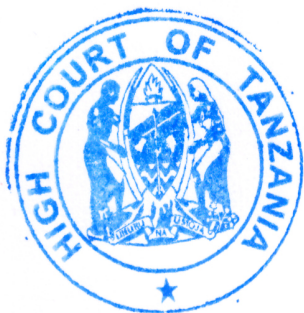
The caveator wishes the will could have divided the estate equally between the beneficiaries. Further, he wishes a copy of the same could have been given to him immediately upon its reading. He complained about Joseph Rutabingwa having denied him the will after it was read. However, wills are about wishes of the testators not beneficiaries. The testator exclusively decide how to bequeath the properties unless his/her powers are limited by law like in Islamic law which is not the case here. Therefore, whether Rutabingwa delayed to give the caveator the will on demand has nothing to do with the validity of the will.



In his submission, Mr. Kobas made interesting comment about the will. That the testator still observed Haya customs and that he was being referred to as "Mtwale Project" per the testimony of PW6. On this account, Mr. Kobas submitted, the will ought to be in line with Haya customs by which the family house at Kinondoni and the plot at Mbweni would not have been bequeathed to the wife who has no child with the deceased. While I agree that there is evidence that the deceased observed some Haya customs and traditions, I am satisfied that he honored not the custom which disinherit women for the reason state by Kobas. His will is loud and clear in that respect. The complaint has no merits.

In the event, I hold that the deceased left a valid will. The first issue is answered in the positive.

To answer the second issue, probate is granted to the petitioner as executor of the will of the late Project Aloyce Rugazia. The caveat is dismissed for want of merits. No orders as to costs.



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**I.C. MUGETA**

**JUDGE**

**13/09/2022**

**Court:** - Judgment delivered in chambers in the presence of the Ida Rugakingira holding brief for Eustace Rwebangira, advocate and the caveator in person also represented by Michael Kabenga, advocate.

**Sgd: I.C. MUGETA**

**JUDGE**

**13/09/2022**

