

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA**

**AT ARUSHA**

**CIVIL CASE NO.2 OF 2020**

**RUDOLF AIKAMBE MSAKI.....PLAINTIFF**

**VERSUS**

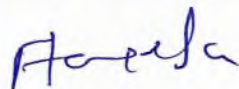
**EMMANUEL TOMAS MILIARI.....RESPONDENT**

**JUDGMENT**

25/08/2022 & 28/09/2022

**MWASEBA, J.**

On 20/01/2020 the petitioner, Rudolf Aikambe Msaki, petitioned for letters of administration of the estate of the late Evarista Remmy Msaki through Probate and Administration of Estate Cause No. 02 of 2020. After general citation being issued, Mr Emanuel Tomas Miliari filed a caveat objecting the appointment of the petitioner for the reason that the deceased left a will and he was mentioned as an executor of her will of which the original was kept at Maji ya Chai primary court and the copies to Prophet Leonard Kiashama of Moshono and another copy to himself.



Upon filing the caveat, the matter turned into contentious proceedings and considering the requirement under Section 52(b) of the Probate and Administration of Estates Act, Cap 352 R.E 2002, Rudolf Aikambe Msaki stands as the plaintiff while Emanuel Thomas Miliari stands as a defendant. The suit was numbered as Civil Case No 2 of 2020.

On the other hand, on 4/03/2020 Emmanuel Tomas Miliari also filed before this court a petition for probate of a copy or draft will of the same deceased's estate via Probate and Administration Cause No. 06 of 2020. The same was objected by Rudolf Aikambe Msaky and the matter turned into a normal suit as well as per Section 52 (b) of the Probate and Administration Cause Act (supra).

Owing to that, the Probate and Administration Cause No. 6 of 2020 in which the plaintiff herein filed a caveat too was stayed by the court on 16/11/2020 pending the determination of Civil Case No. 2 of 2020 which is the case at hand.

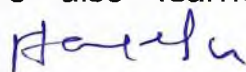
Before dealing with the merit of the matter, I find it pertinent to trace back the facts of the matter, albeit briefly. In January 2015 the defendant herein came to know the deceased who was the plaintiff's aunt. They proceeded with their plans whereby the defendant wanted the deceased to teach him Dutch language and the deceased wanted

*H. Aikambe*

the defendant to support her at her orphanage. Unfortunately, in April, 2015 the deceased suffered from diabetes and blood pressure whereby the defendant was so supportive financially and took the responsibility of taking her to hospital until she recovered. It is said the deceased was impressed and pleased by the defendant hence on 4/11/2015 she went to the defendant's home to thank him for taking care of her. Thereafter, she informed him that she wrote a will whereby the original copy she preserved at Maji ya Chai primary court. She narrated to him about the said will and his duty in case of her death. Thereafter, she gave him a copy of the will, the certificate of Mt. Paul Group Orphanage, title deed of her house and the title deed of her plot located at Maji ya Chai area. The deceased died on 12<sup>th</sup> day of June, 2018, hence this dispute as to whether she died intestate or testate.

The defendant is disputing the petitioner to be granted letters of administration for the reason that he was appointed by the deceased to execute her will. To support his statement, he attached the purported will which was strongly objected by the petitioner herein for allegation that it is a forged one.

During the hearing, Mr Ngereka Miraji, learned counsel represented the petitioner/plaintiff whereas Mr Edwin Silayo also learned counsel




represented the defendant/caveator. To prove his case the plaintiff paraded before this Court three witnesses who are Rudolf Aikambe Msaki (PW1), Dolorosa Seraphine Temu (PW2) and Leonald Simon Kyashamba (PW3). Also, three exhibits were tendered and admitted in Court for the plaintiff's case which is the death certificate of the late Evarista Remmy Msaky (Exhibit P1), the Clan meeting Minutes dated 20/06/2018 and a letter requesting the said minutes dated 23/06/2021 (Exhibit P2 Collectively), Government gazette dated 14/02/2020 and Mwananchi newspaper dated 29/01/2020 (Exhibit P3 Collectively).

On the other hand, the caveator/defendant brought three witnesses by the names of Emmanuel Thomas Miliari (DW1), Lucy Honori (DW2) and Juma David Mwita (DW3). Also, two exhibits were tendered which are Certificate of Registration of Mt. Paulo Group Orphanage (D1) and a Certified Copy of the will (Exhibit D2).

As agreed by the parties, issues for determination by this court are the following:

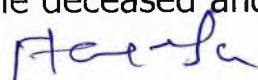
1. Whether there was a valid will left by the late Evarista Remmy Msaki.
2. What relief (s) is/are the parties entitled to.



On the plaintiff's side they challenged the will submitted by the defendant/caveator on the ground that the deceased died intestate. PW1 (Rudolf Aikambe Msaki), who is the deceased's nephew (a son of the deceased's young sister) alleged to have been raised by the deceased since the death of his mother during his birth. He further testified that after the burial ceremony of the deceased a clan meeting was called on 20/06/2018 at Moshi (see Exhibit P2 Collectively) and their grandfather one Baltazary Remmy Msaki chaired the meeting.

He went on to submit that during the clan meeting the Chairman asked if there was anyone with a will but no one appeared. The meeting therefore appointed him as an administrator. Thereafter, he petitioned for a grant of letters of administration of the deceased estate. He was not aware of the will and they did not know the defendant who did not even attend the burial ceremony of the deceased. The defendant just showed up before the court and stated that he had a will while he was supposed to present it before the clan meeting so that it could have been discussed regarding its validity.

His evidence corroborated with that of PW2 (Dolorosa Seraphine Temu), the deceased's sister, who stated that the plaintiff/petitioner is the child of her sister one Maria Remmy Msaki who is the deceased and after the



death of his mother during his birth in 1989, the deceased took him and raised him as his own child. During the clan meeting after the burial of the deceased Evarista, the Clan Chairperson asked if there was any will or any claim against the deceased and nobody claimed having it. Thus, the Clan appointed Rudolf Aikambee to be the administrator of the estate of the late Evarista. She further declared that if anyone says there is a will, they must be liars. Besides, during the Clan meeting the defendant did not attend.

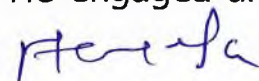
On his side PW3 (Leonald Simon Kyashaba) who is a Pastor at River of Healing Ministry also stated that he knew the deceased Evarista as she was a leader at his church. He knew her family including his son Rudolf and daughters Valentina and Arimgadi and some of the relatives including PW2. He submitted further that the deceased never talked about the will to him as in their church the issue of a will is normally discussed in church board.

On the other side, the caveator/defendant who is a DW1 (Emanuel Thomas Miliari) stated that he knew the deceased since 2015 and that she died on 12/06/2018. It was Utte Matilda who introduced the deceased to him, they become close and she started talking to them about her activities including the orphanage she was taking care through

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the funds she got from German after living there as a sister. The said orphanage was called Mt. Paulo Orphanage Group, she even showed them registration forms and other receipts. He added that the deceased was living with her sister one Levina and during her sickness he was helping her financially. On 4/11/2015 she visited him and told him about the will left at Maji ya Chai primary court in 2015 and gave him a copy due to the kindness he was demonstrating to her (See Exhibit D2- Certified copy of the will). She also gave her title deed of her house, the certificate of Mt. Paulo Group Orphanage (as evidenced by Exhibit D1) and title deed of a plot at Maji ya Chai close to Maji ya Chai primary court. She never gave it to her relatives as they never took care of her when she was sick and they confiscated some of her properties.

He submitted further that after the death of Evarista, he went to see her relatives at Mount Meru Hospital and informed them about the will but they did not receive the information peacefully but ended up chasing him away. He attended the burial services at Moshi but he was never called/invited to attend the family meeting. Later on, when he was in his duties at Mto wa Mbu he was informed that the orphans were chased out of the orphanage by Rudolf who was appointed as administrator of the deceased estate by Arusha District Court. He engaged an advocate

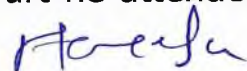




who filed objection proceedings at the same court. Thereafter, he started making follow-up to get the original will at Maji ya Chai primary court and at last he was told that the same was lost eventually the District Court of Arusha dismissed his application. It was his allegation that the petitioner/plaintiff herein apart from trying to remove the children from their orphanage, he withdrew the deceased's monies from her bank account at NMB and CRDB.

More to that, it was his testimony that on 28/10/2015 the purported will was witnessed by Melkior James Kiduma, Mary Aloyce Kiduma and Lucy Hanori Maliti. He prayed for the petition to be dismissed as the petitioner is not aware of other properties of the deceased and neglected the children while he was also raised at the same orphanage and the costs be borne by the plaintiff.

His evidence was supported with that of DW2 (Lucy Honori Maliti) who alleged that the deceased Evarista was her neighbor and fellow worshiper. She testified that on 28/10/2015 the deceased, being accompanied by Mr and Mrs Kiduma went to her house with a will and asked her to be her witness. After reading the Will, she signed it. And DW3 (Juma David Mwita) stated that, in 2015 when he was acting as a magistrate in charge at Maji ya Chai Primary court he attended the late





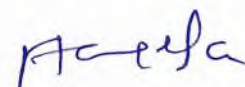
Evarista who wanted to preserve her Will in court. He asked her to pay for the service and after doing so he gave him a government receipt, certified other copies of the Will and the original one was left in court.

At the end, both parties filed their final submission to assist this court in determination of this matter. After having a summary of what transpired in court and glancing on the final submissions from both sides, I wish to go direct to the first issue as to whether there was a valid Will left by the late Evarista Remmy Msaki.

In determining this issue, I wish to put clear that the term "WILL" is defined under **Section 2 (1) of the Probate and Administration of Estate Act**, Cap. 352 [R.E 2002] to mean:

*"The legal declaration of the intentions of a testator with respect to his property, which he desires to be carried into effect after his death."*

This being a legal declaration the court must be assured of its validity for it to be considered as will. In determining the validity of the will, the Court of Appeal set out tests that the court has to consider before grant of probate. In the case of **Mark Alexander Gaetje and Two Others Vs Brigitte Gaetje Defloor**, Civil Revision No. 3 of 2011, Court of Appeal sitting at Dar es salaam had this to say:



*"In a petition for probate, the court is concerned with the validity of the will as annexed to the petition. The questions which will come up are **whether or not the will has been properly executed; whether or not the testator had the capacity to make the will; in the case where the testator has disabilities like blindness, deafness or illiteracy, whether or not the contents of the will were made knowledgeable to him by reading over, etc and he had granted his approval; whether there was undue influence or not; whether there was forgery and fraud or not; and whether the will has been revoked or not.** If the will passes all the tests enumerated above it is taken to be proved, and the court grants the executor the power to administer the will. These requirements of the law are reflected in Sections 24 to 28 of the Probate and Administration of Estates Act, chapter 352 R.E. 2002 of the Laws." (Emphasis added)*

Being guided by the above stated principle, in determining the matter at hand I will consider the questions as to first, whether or not the will has been properly executed and second, whether there was forgery and fraud or not

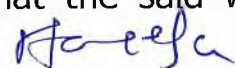
Starting with the first test as to whether or not the will was properly executed or not, **Section 50 of the Law of Indian Succession Act, 1865** states that:



***"The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."*** (Emphasis added)

The above provision is couched in mandatory form that the will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark at the will. It is evident that, this was not the case in this matter. The DW2 testified in court that the deceased went to her home together with Mr and Mrs Kiduma (her neighbours) and asked her to stand as a witness in the will. That she gave her a will and she signed and others signed too. On cross examination she said the will was brought to her while it had already been signed by the deceased. That means the will was not well attested by those witnesses as per legal requirement.

Coming to the issue as to whether there is fraud or not, I wish to discuss how the said will was preserved. It is alleged that the said will was



preserved at Maji ya Chai primary court, to Prophet Leornard Kiashama, and to Emanuel Tomas Miliari (the Executor of the Will). The said Leonard Kiashama came to court to testify as PW3. He admitted to be the pastor of the deceased. However, he denied to have been given a will of the deceased and he said she never talked to him about a will.

Coming to the original copy of the will which it is said it was preserved at the court, DW3 who was a magistrate admitted that the deceased preserved the will at the said primary court. However, the said will is not found, no any court document to prove that the said will was preserved there being a payment receipt of register book to prove the same. This brings doubt as to the validity of the said will. More to that, when DW3 was testifying about the will that he received from the deceased, he said that he wrote his name in the copies of the will and certified them to be a true copy of the original. And prior to be given a copy of the will in court to identify he insisted that he can identify it as he wrote his name as Juma David Mwita and went on to certify it. However, the purported will which was registered in court as exhibit D2 does not display the name of Juma David Mwita. The same witness admitted in court that his signature in his affidavit is different from the signature which appears in the purported Will. This brings doubt as to the validity of the said copy of



the will and I find that it has not passed the tests set by the Court of Appeal in the case of **Mark Alexander Gaetje and Two Others Vs Brigitte Gaetje Defloor** (Supra).

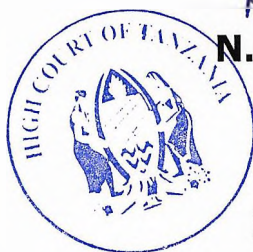
Taking into consideration that the will has not succeeded to the tests that the court has to determine, I doubt as to its validity. Thus, the first issue is answered in negative.

Coming to the last issue as to the reliefs, this being a probate case I give no order as to costs.

In the upshot, I find that the caveat filed by the defendant to be devoid of merit. It is dismissed with no order as to costs.

It is so ordered.

**DATED** at **ARUSHA** this 28<sup>th</sup> day of September, 2021.



*N.R. Mwaseba*  
**N.R. MWASEBA**

**JUDGE**

**28.09.2022**