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. 44 OF 2022

In the matter of the estate of the Late

ZENI RASHID SLIM .....DECEASED

BETWEEN

In the matter of application for letters of administration by

KASSIM ZENI SLIM .....PETITIONER

AND

In the matter of the caveats by

ABDU ZENI SLIM.....1st CAVEATOR

HUSNA ABOUD ABUDAKAR.....2nd CAVEATOR

JUDGMENT

16/09/2022 & 04/10/2022

I.C. MUGETA, J

The deceased left surviving him two wives and four children. One of the children, Abdu Zeni Slim was born out of wedlock. He was a Muslim who left a will bequeathing all his properties to his three children, namely, Kassimu Zeni Slim, Nuru Zeni Slim and Nasrat Zeni Slim. Abdu Zeni Slim is disinherited. The reason is at paragraph 9 of the will thus;

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'Mtoto huyu hatakuwa na fungu lolote kati ya mali zangu hizo.... maamuzi haya nimeyatoa dhidi yake baada ya kumuona hana nidhamu kwangu na mara nyingi nimemkanya ameshidwa kunielewa'.

By the will, the two wives are also disinherited. The first wife, Ashura Mwinyimkuu, who is the mother of the inheriting children has not complained about the will. Paragraph 9 (ii) of the will mandates her to use one of the houses to her death. Abdu Zeni Slim and the second wife, Husna Aboud Abubakar, who is baren, are dissatisfied with the will on account of being disinherited. The reason for the second wife not having a share is at Paragraph 9 (ii) of the will that this wife and the deceased had no community ownership of the properties. Therefore, she already has her properties and she can retain the house hold properties they jointly acquired. The will, however, has a proviso, that in case the second wife demands a share in his estate, she can be given according to Mohamedan Law.

The will was prepared by Godson Nyange, learned, advocate who testified as PW4. It was tendered by Mwajuma Abdul Magoma (PW1) who was its custodian. Zena Mbaraka Magoma (PW2) being sister of the deceased testified on how the will was read after 40 days of mourning. Nuru Zeni Slim (PW3) testified on family life particularly on how the deceased was constantly

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at loggerhead with Abdu Zeni Slim. Her evidence is similar to that of Kassim Zeni Slim (PW6) who is named as executor of the will.

In his evidence, Abdul Zeni Slim (DW1) testified that the reasons given to disinherit him are false because he respected his father. That they differed when the deceased wanted him to do things he was not interest into like being employed with the government while his (Abdu) interest was to work with the private sector.

Husna Aboud Abubakar (DW2) testified about her life with the deceased. That he cared for him and the properties he acquired have a share of her contribution because during their marriage they lived in her family house. Consequently, they saved renting a house and she is the one who paid all utilities bills and provided food.

Hassan Slim (DW3) is a brother of the deceased. He testified among other things, that the estate of the deceased ought to be divided under civil laws not Islamic law which automatically excludes Abdu Zeni while the deceased himself did not live according to Islamic religion tenets. He, however, admitted that at his last days, the deceased observed the pillars of Islamic faith.

The first issue for my determination is whether the deceased left a valid will. To answer this question. I shall determine first the law applicable to the estate of Zeni Rashid Slim. His son Abdul and his bother Hassan Slim prefer civil law because it does not discrimate heirs while Islamic law does against children born out of wedlock like Abdu Zeni Slim. Another reason for Hassan Slim disliking application of Islamic law to his brother's estate is that his religious life was not of a committed Moslem. In essence he wants the court to apply the life style principle to determine the law applicable. However, I shall avoid to venture into this area. I am settled in my mind that the mischief the life style principle intended to cure in probate matters do not include determining whether a person observed the pillars of his faith or not. That is God's exclusive jurisdiction. In my considered opinion the life style principle was intended to protect women disinheritance by discriminatory tribal customs and tradition. Applying it to matters of faith and religion is overstretching it.

There is no dispute that the deceased professed Islam and he died a Moslem. There is no evidence on record suggesting that he renounced his faith during his life time. Further, there is no indication in his will that he had decided to depart from Islamic principles in the administration of his estate. If he so

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intended, he ought to have said so expressly. Since he left a will without such indication and he prophessed Islam, I am not prepared to take the course suggested by his brother to examine her life style and decided whether he observed the pillars of Islamic faith. Consequently, I hold that the deceased was a Moslem and his estate ought to be administered according to Islamic principles.

Having determined the applicable law, I move to the validity of the will. It is settled that a Mohamedan cannot bequeath more than $^1/_3$ of his estate This is the holding in **Naima Ibrahim** as a Trustee of **Mohamud Abdurasul Ismail V. Isaya Tsakiris,** Civil Appeal No 119 of 2009, Court of Appeal, Dar es Salaam (unreported). It is also settled that a Mohamedan cannot bequeath by will his estate to his heirs. The said $^1/_3$ share relates to a bequeath to strangers as for the heirs their share is already described under the holy Quran at Surat Nnisai.

In this case, the deceased bequeathed all his properties to his children meaning they have equal shares. This is against the Mohamedan Law. I accordingly invalidate the will. The first issue is answered in the negative.

Regarding, the son born out of wedlock being discriminated, I hold a firm view that Mohamedan Law has never been discriminatory. Such children are

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entitled to Hibah. This is the right of the father to give him a share in his properties while still alive. If the deceased fails to do so, the siblings can do so under Surat Annisai 4:8 which reads:

> *'...na wakati wa mgawanyo wa mirathi wakihudhuria jamaa zenu, na mayatima na maskini basi wapeni kitu katika mali hiyo ya urithi na semeni nao maneno mazuri'.*

The second issued is; if the first issued is answered in the negative who should be appointed to administer the deceased's estate? Since I have held that the law applicable is Islamic law, this issue is simple. Mohamedan law defines the share of each heir, therefore, any body with interest in the estate can administer the estate under the court's supervision. Consequently, despite invalidating the will, I still find the petitioner suitable to administer the estate. The complaint by the second wife that he may not be fair to him is unjustified. Each heir's share under Islamic law is defined. I, accordingly, appoint Kassim Zeni Slim to administer the deceased's estate according to Islamic law.

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I.C. MUGETA

JUDGE

04/10/2022

Court: - Judgment delivered in chambers in the presence of Attey Tawe, advocate for the petitioner, who is absent and Said Seif advocate for the caveators who are present.

Sgd: I.C. MUGETA

JUDGE

04/10/2022