

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 18 OF 2022**

*(Arising from the decision of Kisarawe District Court in Probate Revision No. 1 of 2021)*

**AMINA KASSIMU MUHANGA ..... APPELLANT**

**VERSUS**

**SOPHIA MUHAMED KINJUNJUHIKO** (Administrator of the Estates of the Late

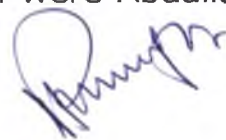
**KASSIMU SALUM MUHANGA) ..... RESPONDENT**

**JUDGMENT**

*Date of Order: 23<sup>rd</sup> & 30<sup>th</sup> September, 2022.*

**MWANGA, J.**

This matter originates from the Primary Court of Cholesamvula in probate and Administration Cause No. 1 of 2021. In his life time, the deceased owned several properties to wit; house No. 133 located at Manzese area, in Dar es salaam Region, another house located at Cholesamvula area at Kwala Village within Pwani Region, a motorbike and bicycle, and three acres of farm. He married to the respondent one Sophia Mohamed Kinjunjuhiko and blessed with four children, who are all dead. Among the three grandchildren of the deceased person were Abdallah Jafari, Abdillah



Aboud Abdillah and Adam Hamisi. It is also relevant fact that the appellant Amina Kassimu Muhanga was the deceased's illegitimate child.

Fortunately, the deceased died testate. Part of the will is reproduced in Swahili language as follows: -

***'Mimi Kassim Salum Muhanga, dini muislam, nikliwa na akili timamu na bila kulazimishwa na mtu yeyote yule, ninapenda kutoa wosia wangu leo tarehe 23/02/2016 mbele ya Hakimku kama ifuatavyo:-***

**A: KWAMBA**

***Amina Kassimu Muhanga ni mtoto wangu wa nje ya ndoa. Nilikaa nikaamua kumpa shilingi milioni kumi (Tshs. 10,000,000/=) tarehe 12 /02/2016 ili kumtoa kwenye urithi halali. Natamka mbele ya mahakama hii kuwa Amina Salumu Muhanga si mrithi wangu tena kwani nimeshampa fungu lake. Na kuhusu shamba langu nililosema apewe kama mrithi ikitokea nimefariki asipewe tena. Hii ni baada ya kukosa nidhamu kwangu.***

**B: SASA**

***Baada ya kusema hayo, natamaka rasmi kuwa warithi wangu wa nyumba yangu iliyopo Manzese mtaa wa Muungano MSZ/MGN/133 na shamba langu ni:-***

- 1. Sophia Mohamed-Mke wangu.***
- 2. Abdala Jafari -Mjukuu wangu.***
- 3. Abdillah Aboud Abdillah-Mjukuu wangu.***
- 4. Adam Hamisi-Mjukuu wangu.***



**MAELEZO YA ZIADA**

***Mimi Kassim Salum Muhanga nimeamua kuwaorodhesha wajukuu zangu kuwa warithi, hii ni kutokana na kufiwa na mama zao (Watoto zangu) ambao ni marehemu Rehema Kassim Muhanga na Salama Kassim Muhanga.***

**MAELEZO YA MWISHO**

***Kwa wosia huu ninatengua wosia wowote ambao niliutoa hapo nyuma, ikiwa naukumbuka na Allah (S.W) shahidi katika hili'.***

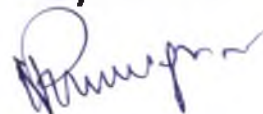
Unofficial translation of the above WILL is as follows- 'I Kassim Salum Muhanga, a Muslim, states that Amina Kassim Muhanga is my illegitimate child. I have given her ten million shillings (Tshs. 10,000,000/=) on 12/6/2016 so as to exempt her legally from inheriting my properties. And that the said Amina Salum Muhanga is no longer entitled to inherit my properties because I have given her, her shares, and shall not even inherit my farm which I had promised earlier to give in case of my death; this is because of her indiscipline. And that my rightful heirs of the properties, that is, a house located in Manzese at Muungano Street MSZ/MGN/133 and a farm shall be; Sophia Mohamed-wife, Abdala Jafari - grandson, Abdillah About Abdillah-grandson and Adam Hamisi-grandson. Finally, he completed his narratives by oath, stating that Allah Subhanna Wataallah (GOD) shall be a witness to this WILL'.



According to the WILL, all properties of the deceased were bequeathed to the widow and three grandchildren, and left behind Amina Kassim Muhanga (illegitimate child). The WILL was witnessed by three witnesses namely; Omari Athumani, Salehe Ally Masalamka, and Said Mwishehe. The WILL was signed before the Commissioner for OATHS in the Primary Court of Magomeni;

The trial court discarded the WILL on the ground of invalidity. It was pointed out that the WILL lacks clarity as to why the appellant was disinherited without assigning reasons and that the appellant was not given an opportunity to defend herself from allegations of indiscipline against the deceased. The respondent being dissatisfied with the decision, she filed Probate Revision Application No.1 of 2021 to the District Court of Kisarawe. The decision was reversed and the court held that: -

***'Exercising my revisionary jurisdiction vested to this court by section 22(1) and (2) of the Magistrate Act, [Cap. 11 R.E 2019], I accordingly declare that the WILL was Valid save for the content of paragraph A where a maker failed to follow legal and procedural requirements on disinheriting respondent in this case. The WILL should be considered in division of the deceased estates to all heirs mentioned under paragraph B of the WILL and respondent Amina***



***Kassimu Mhanga consideration being on the intention of the WILL maker'.***

What I can grasp from the decision of the District Court is that; **One**, the WILL is Valid. **Two**, the procedures of disinheriting the appellant were not followed. **Three**, the WILL shall be executed in accordance with the wishes or intention of the deceased. The ball being turned against the appellant at the district court, she appealed to this court on the following grounds: -

- 1. The trial magistrate erred in law and fact for holding that the will was valid regardless of the revelation that the maker did not follow legal and procedural requirements.*
- 2. The Hon. Magistrate erred in law and fact for holding the will was valid.*
- 3. That the Hon. Magistrate erred in law and fact for determining and invoking revision power against the judgement of Cholesamvula Primary Court in Probate Revision No.1 of 2021.*
- 4. That the magistrate failed to evaluate, examine and analyse properly the decision of the Primary court of Cholesamvula which rendered to deliver wrong decision.*

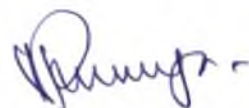
During the hearing, the appellant opted to consolidate 1<sup>st</sup> and 2<sup>nd</sup> ground of appeal and argue them jointly. In respect of these two grounds of

appeal, the appellant submitted that the WILL is invalid because **(a)** neither the appellant nor the widow of the deceased or the grandchildren who are mentioned in the will had witnessed the same when it was being made by the deceased. **(b)** the deceased did not call and explain reasons for disinherit her. **(c)** the persons who said to have witnessed the WILL testified in court that they do not recognize that WILL. **(d)** the WILL contained no signatures of the witnesses, and **(e)** that she was not given ten million shillings (10,000,000) by the deceased as part of her shares.

By way of reply, the respondent submitted briefly that **(a)** the WILL was Valid because there were witnesses. **(b)** it was clear and the same was read out to the parties. **(c)** the appellant was given ten million shillings (Tshs. 10,000,000) by the deceased as part of her shares. **(d)** if the appellant wanted to inherit the deceased estates afterwards, she would have refused to receive the stated amounts of money.

With reference to the submission by the parties, this appeal is premised in two areas. **One**, validity of the WILL, and **Two**, failure to assign reasons for disinheriting the appellant.

What is a WILL? The probate and Administration of Estates Act, Cap. 352 defines a WILL 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. According to the records in this appeal, neither the appellant nor the respondent disputes as to whether the deceased died testator or not but, rather concerned with the requirements of a Valid WILL according to law.

In the first aspect of Validity of the WILL, I wish to state that, I have securitized the disputed WILL and found out that the same is witnessed by three witnesses and their signatures appended to the document. I don't agree with the appellant that heirs of the deceased who were mentioned in the WILL were supposed to witness the same while it was being made by the deceased. I state further that, having read the WILL document carefully, one can find that the deceased stated unequivocally reasons for disinheriting the appellant. He stated that; **One**, that the appellant was given her shares of Tshs. 10,000,000/=, therefore he had no share in respect of the house located in Manzese at Muungano Street MSZ/MGN/133. **Two**, the appellant was disinherited three acres farm by the deceased, after noting the indiscipline of the appellant.

Evidence at the trial court (SM7, SM. 8, SM.9, SM.5), shows that when the appellant received Tshs. 10,000,000/=, she refused instructions of the



deceased to sign a document acknowledging to have received her shares and ultimately thrown away the said document around the toilet, however it was later on recovered and the appellant signed. The said document is a photocopy which indicates that, the appellant had received Tshs. 10,000,000/=, however at the hearing of this appeal, the appellant denied to have received the stated amount. If we are to give effect to the wishes of the deceased who died testator, like the one in this case, the appellant was lawfully disinherited. In **Mark Alexander Gaetje and 2 Others V Brigitte Gaetje Defloor**, Criminal Revision No.3 of 2011, the court stated that:-

***'In probate, therefore, it is the wish of the deceased testator that is given effect as shown in the Will'.***

In discussing the question of the Validity of the WILL, the Court of appeal in **Mark Alexander Gaetje and 2 Others V Brigitte Gaetje Defloor** (Supra) 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; ...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 that tests enumerated above it is taken to be proved, and the court grant the executor the power to administer the WILL'.***

With reference to the above court decision, none of the above were raised by the parties in this appeal. I therefore, convinced to state that the reasons assigned in the WILL are in conformity with the **Local Customary Law (Declaration) Order No. 4 of GN No. 436 of 1963.**

On the 3<sup>rd</sup> ground of appeal, the appellant questioned about revisional powers of the District Court. On the other hand, the respondent stated that the procedures adopted by the district court on invoking revisional powers was correct. I hasten to state that, the respondent was not party to the proceedings in the primary court. At the primary court of Cholesamvula Probate No. 1 of 2021 the respondent appeared as the applicant by the name of 'Sophia Mohamed Kinjunjuhiko' while at the primary court, the respondent appeared as the respondent by the name of **Sophia Muhamed Kinjunjuhiko (Administrator of the Estates of the Late Kassimu Salum Muhanga).**

With regard to the fourth ground of appeal, the appellant submitted that the district court failed to evaluate, examining and analyse the primary court decision, which rendered to deliver wrong decision. She said that she



doubted the action of the District Magistrate by giving a copy of the judgement to the respondent on the same day when it was issued i.e 18/08/2021, while the same copy was given to her on 9/02/2022. The respondent argued to the contrary that, if the evidence of the court was not examined, evaluated and analysed properly, the appellant would not have understood the decision and filed this appeal. It is my considered view that the suspicion by the appellant was baseless. At least he would have supplied this court with the letter written to the court asking to be supplied with the copy of judgment. The evidence to be evaluated here was in respect of whether the WILL was valid or not, and also whether the appellant was disinherited lawful. The district court answered both issues and went further to hold that the WILL was valid and the appellant was lawfully disinherited according to the WILL.

While making reference of the **Third Schedule to the Local Customary Law (Declaration) Order No. 4, GN No. 436 of 1963**, I hold that the deceased gave the appellant her shares and that the appellant was disinherited in respect of the farm, as so stated, because of indiscipline.



Having said all that, the judgement and decree passed by the District Court of Kisarawe is upheld. Therefore, Appeal is dismissed. No order to costs.

It so ordered.



  
**H. R. MWANGA**

**JUDGE**

**30/09/2022**

**ORDER:**

Judgement delivered in Chambers this 3<sup>rd</sup> day of October, 2022 in the absence of the learned counsel for the appellant and presence of the respondent in person.



  
**H. R. MWANGA**

**JUDGE**

**30/09/2022**