IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR-ES-SALAAM -SUB REGISTRY

AT DAR-ES-SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 83 OF 2020

IN THE MATTER OF THE ESTATE OF THE LATE TUMSIFU ELIA SAWE

AND

IN THE MATTER OF APPLICATION FOR LETTERS OF ADMINISTRATION WITHOUT WILL BY AGNESS TUMSIFU SAWE AND JUBILATE TUMSIFU SAWE

VERSUS

TUMAINIEL TUMSIFU SAWE..... CAVEATOR

JUDGEMENT

12th July & 24th August 2023

Rwizile, J.

At law, a person is taken to have died intestate in respect of all property of which he has not made any testamentary disposition capable of taking effect. His property therefore after his death devolves upon his wife or husband, or upon those who are allied to him. In essence, this is the case in respect of the late Tumsifu Elia Sawe who died intestate 8 years ago that is on 23rd February 2016. Three days after his death, he was laid to rest. But unfortunately, his estate is yet to be administered because his children born to different mothers and their mothers have locked horns over the

property he acquired and left behind. They have been in court for years battling to secure what they considered to be his wishes before his death.

When Agness Tumsifu Sawe styled as the first wife of the deceased and her son Jubilate Tumsifu petitioned for letters of administration, a caveat was filed by Tumainiel Tumsifu Sawe attacking the petition on three fronts. The petition did not only include properties that do not belong to the deceased but also excluded properties that belong to the deceased estate. Second, that the deceased left an oral Will stating the manner in which his estate should be administered, and third that the petitioner lacked consent from all the beneficiaries of the estate of the deceased. The caveat, therefore warped the entire exercise of appointment and administration of the estate and necessitated a hearing to sort the dispute out first.

Serenely, the dispute was managed by narrowing down the case into two main jots; **one** whether the contested properties by the caveator form part of the deceased estate, **two**, if the petitioners have credentials to warrant appointment as administratrix and administrator of the deceased estate, and lastly, to what reliefs are the parties entitled to.

The petitioners testified and called no other witnesses. Agness Tumsifu who testified in the first place is referred to herein as Pw1, while Jubilate

Tumsifu, 2nd petitioner testified in the second place to be referred to as Pw2. On the part of the caveators, it was three witnesses who testified namely; Joseph Urio (Dw1), Dorcas Israel Gelege (Dw2), and Tumainiel Tumsifu (Dw3). It is to be noted that Pw2 and Dw3 are sons of the deceased born to Pw1 and Dw2. Pw1 and Pw2 have a dispute that Dw2 is not the other wife of the deceased since she is not a legal wife at the instance of Pw1 who is the first wife.

It has been testified by both Pw1 and Dw2 as well supported by their children Pw2 and Dw3 that the deceased was married to Pw1 in 1972, according to the marriage certificate exhibit P1, but they separated without divorcing in 1988.

According to the evidence of Dw2 by that time, she was working in a shop started at the deceased's homestead. When Pw1 walked away from her marriage, Dw2 got in. From 1992 until when Sawe met his death, they had two children with Dw2, namely Neema and Tumainiel (Dw3). The undisputed evidence further is that the deceased acquired properties when he lived with Pw1 and others were acquired during his association with Dw2.

Before, his death as well, it seems, he gifted Neema and Tumainiel, plots of land No.97 at Kigogo to Neema and No. 95 at Kigogo to Tumainiel, while house No. 1864 at Mavurunza is owned by Dorcas Israel Gelege and another piece of land was given to the Pool of Siloam Ministry at Mavurunza. It was stated by Dw1 that Plots No. 95 and 97 have been transferred to their names. Therefore, the dispute hinges on whether those plots of land legally passed hands to their current owners, which is the first issue.

Determining the first issue therefore, Pw1 stated that immediately after their marriage, they jointly acquired among other things plots of land No. 95 and 97 and a farm at Mavurunza, which constitutes several plots of land. According to her, they were jointly acquired during the pendency of their marriage. She said, that gifting them to his children without her consent nullifies the deeds of gift which are P3 and P2 respectively.

Further Pw1 attacked the deeds of gifts as to have been made contrary to the Notary Public and Commissioner for Oaths Act because they were notarised by Advocate Mbilinyi who actually drafted them, they are therefore illegal and the properties are under the Law of Marriage Act, still matrimonial and should therefore form the estate of the deceased.

Pw1, further stated that the landed properties in Masama Moshi were given to Humphery now deceased, and for houses at Ilala and Kunduchi the title deeds are in the name of Agness and should not be included in the estate of the deceased.

In respect of this issue, it is now settled that when one spouse dies, intestate as in this case, all assets falling in his hands can only be dealt with under the laws of succession. I have no doubt in my mind, the Law of Marriage Act ceases to apply. The reasons for holding so are simple, **one** what constitutes matrimonial assets is defined by the Law of Marriage Act to include the properties jointly acquired by the spouses during the pendency of their marriage under section 114. **Two**, for the properties to be divided between the spouses, each spouse has to prove and establish the extent of her contribution towards the acquisition of the same as in the case of **Bi Hawa Muhamed vs Ally Seif** [1985] TLR 32. **Third,** and perhaps more importantly, in the absence of one spouse, there won't be evidence to establish the contribution of the other deceased spouse, and **fourth**, when one spouse dies, the matrimonial properties jointly acquired and those in the name of the deceased definitely fall in the estate of the deceased to be distributed to the deceased beneficiaries which included the spouse who now changes to be called a widow or widower.

The process falls therefore under the Succession Laws, where the widow or widower has her or his own established share.

In this case, therefore, I do not think the first petitioner who walked away from her marriage in 1988 has the right to claim properties falling under the estate of the deceased to be dealt with as matrimonial assets. Indeed, that concept is wrong and it has no legal backing. Normally, ownership of the landed property is proved by possession of the titled deed. There is evidence that plots No. 95 and 97 were gifted to Neema and Tumainiel, P2 and P3. The evidence to prove that is not in short supply. There are deeds of gifts as shown above. The deceased having known that the two properties would be perhaps taken away from them, they were processed into titled deeds in their names. Currently, they are in their names as per D1, title No. 24515 for Neema, and D2, title No. 34488 for Tumainiel. There is no doubt, therefore, that the two landed properties belong to the undersigned and therefore do not form the estate of the deceased. They should be excluded.

Likewise, there is evidence from the 1st petitioner that she has her own house at Ilala in title No. 42226, exhibit P11, which is in the name of Agness Tumsifu Sawe, as well and the property at Kunduchi exhibit P10 is

in her name based on the purchase agreement. In the same force, they should be excluded from the estate of the deceased. It has to be noted here that the shamba at Mavurunza is with title deed number 53894, with plots number 711/1, 712/2, 715, 693/2 and 692/2 Block A, Kimara Matangini is exhibit P5, belonged to the deceased. Therefore, it forms his estate.

There is evidence that one house built on the premises is habited by Dorcas Israel Gelege (Dw2), who there is no doubt and no dispute that the same has been in a relationship with the deceased since 1992, and has two children with him, who were 28 and 23 years in 2021 when she was giving evidence. It has been shown by Dw2, Dw1, and Dw3 that before she moved to that house, which is also not disputed by the petitioners, lived in the house built for her by the late Tumsifu Sawe. Because it was along the Bagamoyo road at Kimara, it was demolished. Upon its demolition, she moved to the current house in the stated plot. Still, there is evidence that when the said Tumsifu was sick, she took care of him and was ever-present on the hospital bed where he was admitted. In my considered view, if the deceased did not accept her as his wife, he could have expressly stated so. But there is no evidence apart from this presumption that she was his wife.

From this evidence, I hesitate to hold that she was the wife of the deceased.

About the presence of the Pool of Siloam Ministry in the said premises, it has been clearly stated that the deceased permitted building of the temporary structures, and as time went on, he allowed them to build permanent structures which upon his death were not developed. It has been clearly stated as well that he directed that upon his death, should be buried close to the church. He went further and showed the pastor where to be buried. That wish was heeded to and was buried there.

This state of affairs in my view, connotes that the deceased desired to live a Christian life and so by saying and showing the place to be buried near the church he definitely desired the church should stay where it is forever. It is unfortunate that he did not put that into writing.

But one would say, that not all of what the deceased desired ought to be put into writing for the surviving members of his family to follow. One of the incidences that were respected by family members of the deceased was, to bury him near the church. They agreed and respected his wish. Based on the above would it be proper for the estate of the deceased to push away the church where he was buried close to?

Another fact that has been the contention is about properties at Moshi. It was stated that the shambas at Moshi are not the property of the deceased. But there is no evidence to prove whether the same were sold or bequeathed to some other people. The only evidence is one piece of land was given to Humphery who is now deceased. From that perspective only that property alone can be said, it does not belong to the estate of the deceased, it should therefore be excluded. The rest of the properties should form the estate of the deceased.

Having determined the first issue, I have now to deal with the second issue which is whether I have to appoint them as such. In the case of intestacy as the one at hand, granting or denying a petition for letters of administration is a legal issue. It is governed by the law, precisely, section 33 of the Probate and Administration of Estates Act. This means for one to be appointed, it must be proved that; **first** is a person who would be entitled to the whole or any part of such deceased's estate. In other words, it must be a person who has an interest in the estate. This, as well, depends on the level and degree of consanguinity with the deceased. **Second**, it has to be a person who based on the degree of kinship is in a position to safely keep the estate and that possibly will be a proper person to administer the same. In all cases, the court has, although not absolute,

a discretion to appoint such a person. I have found no evidence cogent enough to prove the petitioners are in any way not placed to act as such.

But the 1st petitioner was 72 years old when she was giving evidence before this court in 2021. She is old enough to withstand the stress that follows after an appointment in the unsettled state of affairs as in this case. With her, is her son who said was 49 years old in 2021. But still, the caveator is said to be 28 years old when testifying before this court.

Having said what I have said, I hereby make the following orders;

i. That the caveator partly succeeds to the extent that the following properties should be excluded from the estate of the deceased namely;
   (a) Plots 95 and 97 because they belong to Neema and Tumainiel
   (b) Houses at Kunduchi and Ilala because they belong to Agness
   (c) One shamba/land/house at Moshi which was given to Humprey
ii. In distributing the deceased's properties, the administrator has to consider the premises where the church is situated and the wishes of the deceased in that respect
iii. The same has to consider the house where Dorcas Israel Gelege stays, to live in the said premises throughout her entire life.

iv. The court appoints Jubilate Tumsifu Sawe and Tumainiel Tumsifu Sawe to administer the estate of Tumsifu Elia Sawe. The grant be issued.

A.K. RWIZILE

JUDGE

24.08.2023