IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 15 OF 2021

TERRY D. KINGOLOGO .....APPELLANT

VERSUS

WENDELIN DAGOBERT (Executor of the Estate of the late Dagobert John Komba).....RESPONDENT

(Arising from the decision of the District Court of Kinondoni at Kinondoni)

(Kiswaga, RM)

dated 9th March 2021

in

Misc. Civil Application No. 207 of 2020

JUDGEMENT

18th July & 6th September 2023

Rwizile, J

This appeal arises from the decision of the District Court of Kinondoni. The appellant was aggrieved by the decision of the court that dismissed his application for revocation of the grant of probate issued to Wendelin Dagobert John Komba on 27th March 2020, to execute the Will of his late father Dagobert John Komba. The appellant who is also the deceased son

and beneficiary of the estate, advanced 4 grounds to challenge the decision as follows: -

1. The honorable trial magistrate erred in fact and law by granting Probate which was accompanied by an invalid Will. The Will was not witnessed by at least one relative hence Julius Rutta Angello his affiliation with the deceased is merely a family friend and Januarius Mathew Katekula affiliation with the deceased is merely that of a Godfather.
2. The Honorable trial Magistrate erred in fact and law by not considering the fact that the Will bequeathed a parcel of land in plot No. 92, Bahari Beach Area in Dar es Salaam which is not the property of the deceased.
3. The Honorable trial Magistrate erred in fact and law by granting probate in which the petition was not verified by at least one of the witnesses in the said Will and there was no any application which was made for dispensing with that requirement.
4. The Honorable trial magistrate erred in fact and law by granting probate and appointing an executor on an invalid Will that was not simultaneously witnessed by two witnesses in the presence of the testator, Julius Rutta Angello witnessed on 12th November 2016 and

whose affiliation with the deceased is merely a family companion and Januarius Mathew Katekula on 14th day of November, 2016 and his affiliation with the deceased was merely that of a Godfather.

When the appeal was due for hearing, it was agreed by the parties that the written submission be filed. The appellant filed his submission in time. He was represented by Mr. Baraka Maugo, who argued that, the application before the trial court was made under section 49(1) (a) (c) of the Probate and Administration of Estates Act (PAEA) and Rule 29(1)(2) and (3) of Probate Rule GN. 369 of 1966. It was his argument that the proceedings to obtain the grant were defective in substance. He said, the ground of appeal centers on the validity of the Will. According to the learned counsel, the Will was not witnessed by at least one relative and therefore contrary to rules 5 and 19 of the Local Customary Law (Declaration) order No. 4 GN 436 of 1963 and cited the case of **Albert Patrick Ndakindemi,** Probate, and Administration cause No. 4 of 2019 and the case of **George Mmari vs Anande A. Mmari** [1995] TLR 146.

He said, those who witnessed the Will were Julius Rutta Angello and Januarius Mathew Katekula who where a companion and Godfather respectively, and therefore not family members. It was his argument father

that the Will was not witnessed by them together, which is contrary to section 50 of the India succession Act. The two witnesses according to the learned counsel, must witness the testator sign a Will. Since Januarius witnessed the signing of the same on 14th November 2016, Julius did not, because it shows, he signed it on 12th November 2016 before it was executed by the testator.

Further, it was his view that no one of the two witnesses verified the same before the court which is contrary to section 57(2) of PAEA. The learned counsel was further of the opinion that the Will bequeathed plot No 92 at Bahari Beach which does not belong to the deceased. According to him, the plot was held by the testator under the guardship since he was a minor, but upon attaining full age, it was converted into his ownership. This court was therefore asked to quash and set aside the ruling of the trial court in that respect.

The reply submission was prepared and filed by G.S Ukwong'a & Co – Advocates. It was submitted that, plainly the Will was witnessed by Januarius Mathew Katekula who also appeared as the witness and said is relative to the testator's mother.

It was his view that a relative is in terms of Oxford Dictionary Advanced Learners, a member of the family or close relative. In his view, the two cases cited by the appellant are distinguishable.

It was further argued that the Will complied with section 50 of the Indian Succession Act because it was signed by the testator, and witnesses signed the Will in the presence of the testator. According to the learned counsel, the same witnessed the testator making marks and a signature on the dates stated. It was added that all that was done was in line with the law, that is section 57(2) of PAEA. As to why witnesses did not verify the Will in court, it was stated that the two witnesses were not readily available in Dar es Salaam and it was consented by the parties. It was his argument further that let section 57(2) of the PAEA apply and that the requirement was dispensed with by the trial court. According to the learned advocate, the property stated in the Will was bequeathed to the appellant and there is no dispute that it was given to anybody else. This court was therefore asked to dismiss the appeal.

In a rejoinder, it was submitted by Mr. Baraka almost by reiterating the submission in chief. I do not think, I have to reproduce it again. But in material terms, he said, the submission by the respondent was prepared by

Avity C. Bakuza who did not review his practicing certificate contrary to section 39(1)(b) of the Advocate Act [Cap 341 R.E 2019]. In his view, Mr. Bakuza was therefore not qualified to draft the same. The court was asked to have the submission disregarded. I was cited with the case of **Stanislaus Patrick vs. Sadiki Iddi & Zena Ramadhani land**, Rev. No. 07 of 2021, and the case of **Edson Osward Mbogoro vs. Dr. Emmanuel Mchimbi and the Attorney General,** Civil Appeal No. 140 of 2006 at page 12 and 13.

Having gone through the submissions of the parties, I have to start with the allegation that Mr. Bakuza prepared the submission when in fact had not renewed his practicing certificate. It is clear to me that failure to have the practicing certificate is an issue that disqualifies an advocate from practicing as such. This grave offense, if proved may render, as submitted, pleadings filed by him, and in this case, submissions to be thrown out of the court record.

The records in the proceeding of this appeal has it that, before I took up this matter, my sister predecessor judge, upon going through the raised allegation asked the parties to address her on its propriety. But until she

vacated this office to some other duty station, the court was not addressed on that aspect.

I also tried but all the parties were not readily accessible to address the court on the issue. When I decided to prepare a judgment. I went through the record and found that the respondents' impugned submissions were drafted by G. S. Ukwong'a and company advocates. The allegation leveled is that the same was drafted by Mr. Bakuza. The story featured in the submission. The advocate who so alleged went as far as providing evidence attached to the submission.

In my view, this is wrong. Submissions have never in all been taken as evidence, they are words from the bar. They cannot at any rate be so believed and cited as evidence. But above all, the submissions were signed by G. S. Ukwong'a and company advocates. I am not compelled in law to know and therefore investigate, whether G. S. Ukwong'a is Bakuza or not. I do not think therefore this point is indeed to be accorded weight to the extent of expunging the submission from the records. It is therefore dismissed.

To determine the appeal on merit, I have to first trace the case background. It happened that Dagobert John Komba died on 29.04.2018 at Lugalo

Hospital. As it turned out, the same had a Will executed on 14th November 2016 which appointed Wendelin Dagobert Komba to execute it.

Indeed, upon his demise, the executor petitioned the district court of Kinondoni for probate with a Will attached (Probate Cause No. 30/2019). The same obtained consent from all of the children named in the Will including the appellant. The meeting of the family members consented to the Will and blessed its execution. Upon following necessary legal requirements, the court-appointed and granted probate to Wendelin on 25.03.2020. When the executor filed an inventory on 10th August 2020 the appellant appeared before the court on 19th August 2020, and showed his discontent that their sister Edda Dagobert was not happy about how the Will dealt with the property at Bahari Beach. He too, was not comfortable with the Will bequeathing plot NO. 90 at Bahari Beach to Dagobert Dagobert Komba. He wanted that house to remain the family property and that their sister, given her mental challenges, ought not to be given the house at Mbinga.

The court directed him to file his complaint in a proper forum. That done, on 7th October 2020, he filed Misc. Application No. 207 of 2020. He had two main prayers:

(i) The grant be revoked because the executor of the Will had obtained the grant based on the defective proceedings

(ii) That court be pleased to annul the grant of probate and Will of the late Dagobert John Komba for being defective.

The affidavit supporting his application stated as follows: -

1. *I am Terry D. Kingologo, the biological son and one of the beneficiaries listed in the will of the late Dagobert John Komba, therefore conversant with the facts deposed hereunder.*
2. *I state that Dagobert John Komba died on the 29th day of April, 2018 leaving four issues namely, Edda Dagobert Komba, Terry D. Kingologo, Wendelin Dagobert Komba, and Dagobert Dagobert Komba.*
3. *The deceased Dagobert John Komba left behind a Will that named Wendelin Dagobert Komba and Dagobert Komba as executors. Copy of the purported will is hereby marked as annexure TK -1 so as to form part of this affidavit.*
4. *I am the brother and sibling of Wendelin Dagobert Komba. I further state that Wendelin Dagobert Komba petitioned for probate before the district delegate of Kinondoni sometime in 2019 and subsequently, the*

court appointed him as the executor of the will of the late Dagobert John Komba.

5. *I state that the purported Will was executed by the late Dagobert John Komba on the 14th day of November 2016 and attested before Astrid Mapunda the Notary Public and Commissioner for Oaths on the same date.*
6. *I further state that the other witness in the purported Will was witnessed by Januarius Mathew Katekula on the 14th day of November 2016 and his affiliation or relationship with the deceased was merely that of a Godfather.*
7. *Furthermore, the purported will was witnessed by Julius Rutta Angello whose affiliation with the deceased according to the said will is merely a family companion, only to that extent but not a relative. I further state the will was attested and signed by the said witness on 12th November, 2016 meaning a day before it was executed.*
8. *In reference to paragraph 7 above, the date on which Julius Rutta Angello the witness who penned his signature, which was on the 12th day of November 2016 in the said Will, is inconsistence with the date on which the testator, the late Dagobert John Komba executed the Will, which was 14th day of November 2016.*

9. I further state that in the circumstance above, the will was witnessed before two witnesses namely, Julius Rutta Angello and Januarius Mathew Katekula who are both not relatives of the testator.

10. I am also a brother to Edda Dagobert Komba who is my sister and mentally incapacitated. Therefore, it appeared to me she had signed the inventory under her sole capacity of a person of unsound mind without being afforded guidance or assistance by a next friend. Copy of the proceedings is hereby attached and marked as annexure TK-2 so as to form part of this affidavit.

11. I further state, that since the named executor petitioned for probate, Edda Dagobert Komba was never afforded any representation through her next friend, and her right to contest was shunned by the executor and such petition has never been verified by at least one of the witnesses to the will.

12. Further I confirm that the properties of the deceased which I am conversant with are situated in different regions and districts; hence some are outside the place of domicile of the deceased.

The court heard his argument and dismissed his prayers. He was aggrieved and filed this appeal on the grounds stated above.

Dealing with the first ground there is no dispute that the Will was signed by Julius Rutta Angello and Januarius Methew Katakula who are a family friend and Godfather respectively. In his submission in chief, Mr. Baraka said, that failure to witness the Will by at least one relative is contrary to rules 5 and 19 of the Local Customary Declaration Order 1963. But in his rejoinder, he submitted that it conflicts with section 50 of the India Succession Act 1865. He further said the two witnesses of the Will did not see the testator affix his signature on the Will. He said, it is because one Julius Angella signed on 12th November 2016, before it was even executed, while Dagobert signed it on 14th it was by the testator.

It should be noted that on 13th March 2020, before the trial court, the appellant had no dispute with a Will or the executor because he said he had no problem with anything after being asked. What is it that caused such a u–turn in respect of the Will and its executor?

The customary declaration order GN 436/1963 applies when the Will is made under customary law. As cited by Mr. Baraka, it is from it that the law requires such Will to be witnessed by attested one relative to the testator. The law categorically states that;

A written Will must be attested by witnesses who know how to read and write – that is, witnesses should number at least two (one from the clan and a neutral person), should the person who made the Will know how to read and write. There should be at least four witnesses (two from the clan and two neutral people) – if the person who made the Will is illiterate.

On the other hand, the India Succession Act provides in terms, of section 50. That a Will should be witnessed by two persons.

The Will be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; each of the witnesses must 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

The difference between the Will under the Indian Succession Act and the Customary Law Declaration Order is clear and apparent. It all depends on

the lifestyle of the deceased and the manner in which the Will was executed. In this case, the Will was executed before advocate Astrid Mapunda, who signed and attested the same, as well as stamped on it on the day it was signed by the testator. It was also witnessed by the said two persons as shown above. In all cases, therefore, having witnesses in a Will is a requirement that cannot be dispensed with. But in this case, I do not agree that the Will was not made under customary law to require the witness to be relatives of the testator. After all, it was not submitted by Mr. Baraka that it was made under the customary law declaration order. It seems he did not even know the position of the law and the status of the Will because he cited both laws first in submission in chief as customary declaration order and in a rejoinder to the Indian Succession Act. if therefore there is anything to go by, it should not be taken that a Will can be done under both laws since they are in conflict. If I may be pardoned for saying so, with respect, I have yet to come across the Will that should comply with both laws when in fact they produce different requirements in one aspect. I find no merit in the argument.

The second is about having the Will signed by two witnesses but on different dates, one witness signed on 12th November, while the other signed on 14th

November, along with the testator. There was no reliable argument as to what happened in this aspect. But surface to say that, in the absence of an allegation that the Will was forged which is not pleaded it cannot be taken that the said irregularity by itself nullifies the Will. The appellant ought to have raised a point before the appointment of the executor in the form of a caveat, which would have at least called for evidence from those who attested the same to testify. In as much as I agree that what has been stated constitutes an irregularity it does not conflict with section 50 of the Indian Succession Act as the appellant just intimated. In the absence of proof in that respect. I take his accusation on this point as an afterthought. This ground fails as well.

The second ground is about bequeathing plot No. 92, when it does not belong to the deceased's estate. This should not detain me any longer. The appellant did not prove so. He merely alleged and it was therefore not proved that the alleged property belonged to someone else as not form part of the estate of the deceased as named in the Will.

The 3rd ground is that the probate was not verified by at least one witness to the Will in filing a probate case where the Will is annexed, in terms of section 57 of PAEA. The persons who witnessed the Will have to verify it in

court. This requirement however may be dispensed with by the court. It was submitted by the respondent that the court dispensed with this requirement. However, upon going through the record, there is nowhere in the proceedings that shows the court made a note dispensing that requirement. There is no such a record in the proceedings and the law was not therefore complied with.

From the foregoing, this court has examined the petition, the application, and all documents attached to it, I have come to the conclusion that despite not verifying the Will Julius Angello Rutta signed the bond and certified the financial position of the executor. This means the same, if he had not witnessed the Will would have stated so.

The family meeting which was attended by the appellant the Will was read by the family lawyer and none of the beneficiaries contested it. The same was brought to court and then nobody among the beneficiaries raised any alarm in respect. The appellant was present all along. It is clear to me that there were no problems in the way the Will was executed, kept, and ultimately brought to court. Of all 5 beneficiaries of the estate of the deceased, it is the appellant who is not happy with the Will. I do not think, based on the stage of the case, the appellant was not justified in raising

those concerns. If indeed, the claims he aired were reasonable enough, they could have been raised at the earliest time possible. They are an afterthought.

He was well aware and participated fully in all stages. This being a probate court, I think unless there are grave errors occasioning injustice on the party of the beneficiaries, complaints not taken at the earliest, should not be entertained at some stage close to the last stage of the execution of the Will. Failure to take them at the earliest time possible this court considers the illegalities stated, in the circumstances of the case, not viable to nullify the Will and the entire process. For the foregoing reasons, I find no merit in the appeal. It is therefore dismissed in its entirety. I do not order costs on any party.

HIGH COURT OF TANZANIA

ACK. RWIZILE

JUDGE

06.09.2023