

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR-ES-SALAAM -SUB REGISTRY

AT DAR-ES-SALAAM

PROBATE AND ADMINISTRATION CAUSE NO. 65 OF 2021

IN THE MATTER OF THE ESTATE OF THE LATE GEORGE MUBEZI LWAKATARE

AND

**IN THE MATTER OF APPLICATION FOR PROBATE BY DR. JOHNSON
MUHUMULIZA LWAKATARE AND DR. FLORA NGWALALI**

AND

IN THE MATTER OF THE CAVEAT BY MILLICENT JOHN LWAKATARE

JUDGEMENT

19th July & 06th September 2023

Rwizile, J.

On the 21st of February 2011, George Mubezi Lwakatare executed his final Will and named Dr. Johnson Lwakatare, Dr. Flora Ngwalali, and Bertram Eyakuze to be the executors of the same. Upon his demise on 12th February 2021 at Shree Hindu Mandal Hospital, in Dar es Salaam this petition was filed, praying for an appointment to administer his estate.

Millicent John Lwakatare filed a caveat on 20th July 2021 to oppose the grant based on the following reasons; **first**, the Will has excluded one of the beneficiaries, the deceased's child Grace George Lwakatare and there is no reason advanced. **Second**, the Will is defective as it has bequeathed a

property which is under joint tenancy. **Third**, the will is defective for bequeathing the sole property of the caveator. **Fourth**, the will is defective because the testator did not consult the caveator who is also vested with interest in the bequeathed assets as a wife, assets named in the Will were acquired jointly. **Fifth**, the caveator does not trust the petitioners as they have bad blood for not accepting her as a wife of the deceased and instead referred to her as a concubine (mzazi mwenza)

When the matter became contentious, it was treated as any other civil suit in accordance with **Section 52 (b)** of the Probate and Administration of Estate Act, (PAEA) [Cap 352, R.E 2002]. This Court wishes to refer to the case of **Monica Nyamakere Jigamba v. Mugeta Bwire Bhakome & Another**, Civil Application No. 199/1 of 2019. The Court of Appeal had the following observation:

"Where a Caveator appears and opposes the petition for probate or letters of administration then sub-section 3 of Section 59 of the Probate and Administration requires the Court to proceed with the petition in accordance with paragraph (b) of Section 52 of the Probate and Administration which provides; In any case, in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the Petitioner for the grant shall be

a plaintiff and any person who appears to oppose the proceedings shall be the defendant.”

On the 27th of September 2021, the main jots for determination were framed as follows;

- i. Whether the Will left by the deceased is valid.*
- ii. If the first issue is answered in the affirmative, whether the probate be granted.*
- iii. To what relief(s) are the parties entitled to?*

In the course of the hearing, the petitioners tendered five witnesses including Dr. Johnson Muhumuliza Rwakatare (Pw1), Pontian Nestory Mutaiwa (Pw2), Samuel Lwakatare (Pw3), Brian George Lwakatare (Pw4) and Dr. Flora Atugonza Lwakatare (Pw5). The caveator, Millicent John Leonard (Dw1) testified and, tendered one other witness George Mubezi Lwakatare (Dw2).

In terms of their evidence, Pw1 said, the deceased was his nephew and was his friend during his lifetime. He tendered a death certificate, exhibit P1. Pw1 testified that a family meeting was held on the 26th of February 2021 after his burial and the Will which was kept at RITA was read at the meeting. The information about the Will was communicated by Pontian and Leah, that they witnessed the Will and that it was kept at RITA. It is as well, reflected in the

minutes exhibit P2. Pw1 further stated that he was appointed as the executor together with the deceased's sister Flora Lwakatare to administer the estate. It was his evidence further that the family agreed that Eyakuze should not administer the estate because he had a case against the deceased in court. It was further discussed that a child named Grace Lwakatare was not born when the Will was executed, and the family decided to list her among other heirs of the deceased estate.

Pw2 testified in support that he worked for the deceased since 1999 as a driver. He said he witnessed a Will being signed on 21st February 2011. After the signing of the Will, it was placed in an envelope, sealed with a round seal and kept at RITA. He tendered it as exhibit P3. Exhibit P3 according to the witnesses is the Last Will which named Pw1, Pw2 and Bertram Lwakatare executors. Pw1 also stated that he was granted letters *pendente lite* only to supervise the two companies and pay salaries to the workers. He asked this court to grant the probate.

The other evidence for the petitioners was given by Pw3. He materially supported the evidence of Pw1 and Pw2. He added that the caveator was not married to the deceased because according to exhibit P5 which he tendered from the District Administrative secretary, there was no such marriage entered in the register of marriages.

Pw4 is the biological son of the deceased born to Mary. His evidence was that his other siblings from his mother are, Michelle and Grace. Millicent according to his evidence had Leonard, Chelsea, George Junior, Ruth, and Jeremiah. It was his evidence further that Millicent had other children born to another man as Esther, Vanessa and Loreen. He testified that the petitioners are neutral to all deceased children and let them be appointed. The evidence of Pw1 to Pw4 was supported by the co-petitioner, Pw5. It was the petitioners' prayer that the probate be granted as per the petition.

In defence, Millicent John Leonard (Dw1) said was married to the deceased in 1994 in a customary marriage. She testified that the petitioners had breached the trust owed by the deceased because they had withdrawn funds from the Hygiene Company without accounting for it. Above all, it was her evidence that the deceased appointed 3 executors but does not know why the third executor was excluded. She further testified that the family excluded her as a wife of the deceased and only regarded her as a concubine (mazazi mwenza). Also, she testified that Grace George Lwakatare is the daughter of the deceased born by Mary but she is not named in the Will. Also, Mary had constructed a house at Mbezi Beach Samaki Samaki Plot No. 186, Block D and another house Block J 972 has no problem with those properties. It was her evidence that she loved all the deceased children and

had stayed with them when they were young even though there was a misunderstanding created by the family members.

She stated that Plot No.1536 house No. 1536 at Olorien Arumeru Arusha was allocated to Lucy and Chelsea. She testified it is her property; it must be removed from the list of the deceased house forming his estate. She asked the court not to appoint the petitioners because they are not fair to her.

Dw2 was George Mubezi Lwakatare, who testified that the deceased was his father and had two wives, with 7 siblings.

It was his evidence that recently, their relationship has become bad as they cannot talk and discuss family affairs. According to his evidence, Dr. Johnson (uncle) is the one dividing the deceased children after he was granted probate *pendente lite*.

In their closing submissions, briefly, the petitioner was of the opinion that, after the Will has been admitted as exhibit the burden shifts to the caveators to disprove the Will. It was argued that Dw1 and Dw2 gave different stories from what they pleaded. I was referred to the case **of Barclays Bank (t) Ltd versus Jacobo Muro**, Civil Appeal No. 357 of 2019, Court of Appeal.

The caveator was also of the opinion that the Will is invalid as it contains joint properties. The Will, it was argued mentioned three executors but one executor Betram Eyakuze was excluded by the family members. Further, it

contended that the Will excluded Grace from the Will without any cause. An argument was levelled as well that one of the petitioners is not trustworthy as he misused funds after obtaining a grant *pendente lite*.

After considering the evidence and submissions, I was asked to determine first, Whether, the Will left by the deceased is valid. The law defines a Will under section 2 (1) of the Probate and Administration of Estate Act, PAEA- [Cap. 352 R.E 2019] and as well, it was so stated in the case of **David Samson Shunda & 2 Others v Mashimo Kibungi Ndulu**, Pc Probate Appeal No. 6 of 2021, that it is;

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

Also, the case of **Prof Hubert Clemence Mwombeki Kairuki** (Probate & Administration Cause No. 4 of 2005. Since the first issue is on the validity of a Will, in terms of the case of **David Samson Shunda & 2 Others v Mashimo Kibungi Ndulu** (*supra*) on page 8, the court referring to Black's Law Dictionary, 9th Edition had this to say about the term validity: -

"validity" means legally sufficient or binding properly, on the other hand, it means "correctly" or "satisfactory".

In this case, a Will is exhibit P3, the same is on the original form. It is signed on every page and it was witnessed by Leah Samuel, Pontian Mutaiwa (Pw2), and attested by Edna Kamara who was an Assistant Administrator General. In this proceeding, the caveator challenged the validity of the Will for the following reasons; that the Will has included some of the properties that do not belong to the estate of the deceased. According to the caveator, some are her personal properties and others are under joint tenancy. From the submission, Dw1 stated that she resides at Plot. No. 438 and 439 Block J, Mbezi Beach, and it is owned jointly, it should not have been stated in the Will. Further, it is Plot 1536 house No. 1536 at Olorien Arumeru Arusha which is in her name. The caveator, cast with the duty of proof to support the fact she alleged, did not call evidence to prove landed properties named in the Will belong to her and that others are held jointly. Section 110 of the Law of Evidence Act, [Cap 6, R.E 2022] clearly states that;

"Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

Another reason for contesting the Will is that one of the executors of the Will did not petition for probate and was excluded by the family meeting. On this point, I think the family members were wrong to interfere with the deceased

wishes on who to administer his estate. If the deceased wanted him to be excluded, he could have said so.

Lastly, the caveator stated that the Will excluded one of the beneficiaries namely Grace George Lwakatare and there are no reasons advanced. It was argued for the petitioners that the Will was executed by the testator on 21st February 2011. Grace Lwakatare was born on 16th March 2013, there was indeed no intention of the deceased to exclude his child from inheritance. This argument was not supported by Dw1 and Dw2. It is a common understanding that at the family meeting, this issue was discussed. An agreement was reached that since she is indeed the child of the deceased she should be listed as a beneficiary in terms of exhibit P2.

It is worth noting that as submitted by the petitioners the Will was executed on 21st February 2011, the child Grace Lwakatare was born on 16th March 2013 and the late George Mubezi Lwakatare passed away on 12th February 2021. It means, it was 8 years from the date Grace was born and the death of her father. The deceased knew that all his properties were bequeathed in a Will. He had enough time to prepare the last Will which could have included all of his children. In terms of exhibit P2, the family decided to list Grace among his children. This fact is not disputed throughout the proceedings.

The question to answer is, what properties will Grace inherit, given the fact that there is no property left out in the Will?

The evidence clearly shows all properties have been given to all other beneficiaries by the deceased himself. With this Will in place, there is no way Grace can benefit from the estate of her father. Despite the good intentions of the deceased to leave a well-recorded Will and the family to list her as the beneficiary, there is no way this Will can be executed as it is. The duty of the executor in law is to execute the Will as it is. In actual fact, it is a ground of revocation, if the executor for some reason alters the Will in order to execute it. Indeed, the Will should be executed to the last letter.

From the above finding, I agree with the caveator's assertion that the Will is invalid for leaving behind a beneficiary without any justification. In terms of section 25 of the Indian Succession Act, of 1865, a man is considered to die intestate in respect of all property of which he has not made a testamentary disposition which is capable of taking effect.

In this case, since the Will cannot be executed as it is, it should be taken that he died intestate. It is from the forgoing reasons, that the Will is invalid. It cannot be executed without medication.

Going to the second and third issues as to whether the probate can be granted and what are the reliefs to the parties. Section 24(1) of PAEA, clearly

states that probate may be granted only to the executor appointed by the will. This section should not be read in isolation, it should be read with section 33(1) (a) to (d) of the Probate Rules, 1963 which makes it mandatory for a petition for probate to be accompanied by the last Will, certificate of death affidavit as to the deceased domicile and executors' oath. In the absence of the Will, there cannot be an executor. Neither the petitioners nor the caveator who are in so far as this petition is concerned capable of being appointed. The petition therefore cannot stand.

Based on the findings, the parties are at liberty to petition for letters of administration in terms of rule 39 (a) to (g) of the Probate Rules. Having said so, the caveat succeeds. The petition is struck out.




ACK. RWIZILE
JUDGE
06.09.2023