

**IN THE HIGH COURT OF TANZANIA  
(TEMEKE HIGH COURT SUB-REGISTRY)  
(ONE STOP JUDICIAL CENTRE)  
AT TEMEKE**

**PROBATE AND ADMINISTRATION CAUSE NO. 37 OF 2023**

In the matter of the estate of the late

**DOMINIC FRANCIS RWEHUMBIZA..... DECEASED**

**AND**

In the matter of an application for letters of administration with  
the Will Annexed by

**RAYMOND RUTATINISIBWA RWEHUMBIZA .....1<sup>st</sup> PETITIONER**

**NORAH KITINGA RUSOBYA.....2<sup>nd</sup> PETITIONER**

**RULING**

Date of last order: 07/02/2024

Date of Ruling: 09/02/2024

**OMARI,J.**

The Petitioners Raymond Rutatinisibwa Rwehumbiza and Norah Kitinga Rusobyia who are respectively the son and widow of the late Dominic Francis Rwehumbiza, petitioned for letters administration with the Will annexed so that they be appointed to administer his estate. According to the Petition, the deceased died at Bukoba Regional Referral Hospital at Bukoba Kagera Region on 16 Dec 2020. Upon publication of the Petition by way of a General Citation



under Rule 75 of the probate Rules 1963(the Rules) one of the heirs sought object the Petition and filed a Caveat under section 58(1) of the Probate and Administration of Estates Act (the PAEA). The ensuing legal procedures were followed.

On 27 July, 2023 the Petitioners lodged a preliminary objection which both parties were heard was sustained rendering the Caveat ineffectual and on 14 November, 2023 this court struck it out. After the Caveat was struck out, this court proceeded to hear the Petition with the Will annexed on 06 December, 2023. The said hearing was conducted as per section 61(1)(a) of the PAEA and as a result the two Petitioners were sworn in and testified before the court.

The 1<sup>st</sup> Petitioner, informed this court he is the son of the deceased. He stated that the Will which is annexed to the Petition was executed on 17 April, 2020. He admitted to have read the Will however did not know before whom it was executed. The 1<sup>st</sup> Petitioner informed this court that he came to know of the Will through one Robert, his brother but did not know when and how Robert got hold of the said Will. Raymond Rutatinisibwa Rwehumbiza also informed the court that there were copies of the will addressed to each of the late Dominic Francis Rwehumbiza's children that came a light 9 months after his

death. He testified further that at the family meeting held after the burial it was agreed that the Will be read during the first anniversary of the deceased's death, which it was. According to him they were able to comply to the deceased's wishes as regards the burial since Robert was aware of the contents of the Will.

When I prodded on the characteristics of a valid Will, to gauge if he knew any, the 1<sup>st</sup> Petitioner listed that the testator has to be of sound mind, have it written by his own volition not under duress, list the beneficiaries; it should be a secret and lastly the properties therein are to belong to the testator. I also prodded on the Will annexed to the Petition lacking witnesses the 1<sup>st</sup> Petitioner informed this court the reason could be he was under stress because of the existence of COVID-19 (this is the short form and commonly used moniker for the Coronavirus disease 2019) at the time of making it. He went on to state that at the time the family had advised the deceased to refrain from contacting people except those he was living with. He concluded by informing this court that he believes the Will is of the deceased Dominic Francis Rwehumbiza because it is written in his parlance and some of the things, he wrote no one knew about as they came to their knowledge later.

A handwritten signature in blue ink, appearing to be 'D. Rwehumbiza', is located in the bottom right corner of the page.

The 2<sup>nd</sup> Petitioner, Norah Kitinga Rusobya stated that the deceased was her husband who died on 16 December, 2020 at Kanyigo, Bukombe but the last office procedures were done at the Bukoba Regional Hospital. She admitted to not knowing whether he had already died in the village before arriving at the hospital. She further informed this court she did not know when the said Will was written and she only came to know of the same after two or three days of the death of her husband. Robert, one of the deceased's children informed the family that there was a Will and the same stipulates place of burial as Dar es salaam. The 2<sup>nd</sup> Petitioner stated that she saw the said Will after the 1<sup>st</sup> year anniversary of her husband's death. And, that except for Robert no one knew of the said Will.

When I prodded whether the 2<sup>nd</sup> Petitioner knew the contents of a valid Will, she stated there are various kinds of Wills including customary Wills. In her opinion a Will has to have the makers name, the bequests, debts, children, executors and those who will be responsible for the deceased's affairs. She added that it also has to be signed, dated and the maker be of sound mind. The 2<sup>nd</sup> Petitioner further informed this court that she believes the document annexed is the deceased's Will because it has his signature and the way the





properties are itemized. According to her the deceased was of sound mind as she spoke to him only three hours before his death.

After hearing the Petitioners as per section 61(1)(a) of the PAEA the Petitioners' counsel, Mr. Bernad Mbakileki requested to be allowed to file a voluntary submission for there are developments in the area of Wills that he wanted this court to be aware of. He was given leave and a date by which to do so and he complied. I appreciate counsel's efforts and work put in preparation of the said submission which I discuss in the following paragraphs.

In the said submission Mr. Mbakileki urged this court to accept the document annexed to the Petition as a last Will and Testament of the late Dominic Francis Rwehumbiza. He gave reasons for his view. The first is that every general rule has an exception therefore there are exceptions to the requirement of Wills needing witnesses. To him, the said Will being made on 17 April, 2020 in the midst of the COVID 19 outbreak caused the testator, who was 81 years old at the time, thus, forming part of the high-risk population and by necessary implication having to take extra precautions.



Counsel then submitted that the quality of the said Will that is; being typed, signed and without any alterations, leaving the legacies leaves no doubt it was made by the deceased while of sound mind and free disposition. He also added that when one reads the document, they can see he knew well the beneficiaries thus, his last wishes and legacies should not be tempered with. Counsel further stated that there was family consensus; apart of course from the afterthought of in the words of counsel the unsuccessful Caveator.

Mr. Mbakileki finished his submission with reference to the case of **In the matter of the estate of the late Benedicto Joseph Rutaihwa and In the matter of an Application for Grant of Probate by Aloysius Benedicto Rutaihwa**, Probate and Administration Cause No. 1 of 2013 and that of **Mathew v. Emil** PC Civil Application 24 -M- 70 30/6/70.

After consideration of all the above, the question before me is whether the Petition for grant of letters of administration with the Will annexed by Raymond Rutatinisibiwa Rwehumbiza and Norah Kitinga Rusobya is properly before me. Such Petitions are governed by section 55 of the PAEA. For ease of reference, I reproduce the section in part as follows:

***'(1) Application for probate or for letters of administration shall be made by a petition with***



***the will, or, in the cases mentioned in section 25, a copy, draft or statement of the contents thereof annexed with the will stating– (a) the date and place of the will testator's death; (b) that the writing annexed is his last will and testament, or as the case may be; (c) ....'***  
(Emphasis supplied)

This means for a Petition to be viable under section 55(1) of the PAEA it has to be with the Will, a copy thereof, draft or statement of the contents thereof. In this particular case the Petitioners have stated in paragraph 4 of their Petition that they are persons named in the said Will and appointed during the family meeting of 27 December, 2020 to act as Petitioners.

Scrutiny of the document the Petitioners are referring to as a Will does not name any executor thus, their application being one for letters of administration with the Will annexed and not Probate.

That said; I also have to canvas the question of whether there is a Will for this court to grant the Petition as sought by the Petitioners. Section 2 of the PAEA defines a Will as:

*'Means 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'*





The validity of the deceased's declaration is assessed on *inter alia* the testamentary capacity of the testator, the intention and formality. The attached document being purported as a written Will I seek to be guided by section 50 of the Indian succession Act, 1865 (the ISA) which is applicable in Tanzania by virtue of section 14 of the Judicature and Application of Laws Act Cap 358 RE 2019. For ease of reference section 50 of the ISA provides:

***'Every testator, not being a soldier employed in an expedition, or engaged in actual warfare or mariner at sea, must execute his will according to the following rules: - First – The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction. Second – The signature or mark of the testator or signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will. Third – The will shall be attested by two or more witnesses, each of who 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; and each of the witness 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'*** (emphasis supplied)

The above provision is clear, unless one is making a privileged Will, which is not the case in the present Petition, the same has to be signed by the testator and has to be attested by at least two witnesses. This is done for two purposes. The first and more important purpose is to authenticate the testator's signature when the will is brought to court one of the witnesses has to verify the Petition as per section 57(2) of the PAEA. This is also meant to evidence that the Will was duly executed by the said testator.

Before I canvas the argument by the Petitioners' counsel I wish to briefly discuss on the formality of written Wills under customary law as governed by the Local Customary Law (Declaration) Order, 1963 G.N No 219 of 1967 (the Order) since the 2<sup>nd</sup> Petitioner seemed to imply that their purported Will is made under customary law though she was not very specific or detailed in her averment. Like the Will under section 50 of the ISA a customary Will also requires witnesses for a written will and the only difference would be the requirement of presence of wife or wives of the testator where one is literate then there must be two witnesses, one of whom has to be a clan member as provided for under Rule 18 of the Order.



"Will" in this case. Moreover, on page 3 through to 4 of the typed judgment this court had the following to say:

*'For instance, one of the reasons given was that the testator Benedicto Joseph Rutaihwa during his life time applied the so called "HOTCHPOT PRINCIPLE" and had made known the division of his estate among his children except for ten heads of cattle. That following his death every son and daughter knew his/her part of the estate and was satisfied and accepted his last will when the same was discovered on 18 September, 1978 and read out to the family members and close neighbours. It is stated that peace has reigned all along in the family since then up to date'*

Clearly the above cannot in any way be compared to the present case as there is no evidence that the deceased applied the so-called hotchpot principle in his life. In my view the purported will has no attestation thus, lacking in form as required by section 50 of ISA. This does not in any way make the Petitioners' prayers that this court turns a blind eye to that requirement good in any optics. What made Probate and Administration Cause No. 1 of 2013 a 'unique one' in the words of my brother Judge Mjemmas J. is what made him exercise his discretion and dispense with the verification of the Petition. I am afraid I see no compelling circumstances for me to do so as regards the purported Will in the present Petition.



Having discussed the above; I now seek to discuss the argument by the Petitioners' counsel that this court can dispense with the requirement of attestation of the said Will in the circumstances. While I agree with him that the purported Will was drafted and executed in the midst of COVID – 19 for it is dated 17 April, 2020 however, I am also alive to the fact that there was never a total lockdown in the country even for the high-risk population(s) as the deceased would have been classified to be in due to his age.

In the same breath, I fail to refrain myself from observing that none of what the two Petitioners and the learned counsel averred as regards the prevailing conditions and extenuating circumstances are documented by the testator to at least make one try and understand his intention and the omission to have witnesses.

As for the authorities cited by counsel the first one is distinguishable from the current Petition as what this court was asked to dispense with in Probate and Administration Cause No. 1 of 2013 is the verification of the Petition by the witnesses of the Will as is required by section 57 of the PAEA who due to the circumstances of the case, that is the nature of the "Will" which was written in a notebook in the form of a diary did not do so. This is different from the





In the second case that counsel referred to the Ag. Judge held:

*'(2) The document produced by the Appellant as the will of Mathew was properly rejected by the magistrate as it was (a) not signed by the testator (b) it showed alterations and (c) there was every reason to suspect the thumb prints alleged to be of witness of the will were not genuine.'*

This, in my view shows the learned judge dismissed the Appeal on the ground that the purported Will be lacked in form. In the current case the purported Will albeit being signed is not attested thus, lacking in form.

In a nutshell, and respectfully of course, the learned advocate as well as the Petitioners have failed to provide compelling reasons as to why this court should consider the attached document as the last Will of the deceased Dominic Francis Rwehumbiza as have the two Petitioners. The COVID – 19 narrative, though compelling has not convinced me. Firstly, while it is true that COVID-19 brought with it unprecedented situations however, this country was not in lockdown. Secondly, unlike in some jurisdictions where there were calls and ultimately legislation for the relaxation of laws regarding formalities of Wills either in the interim or permanently; there were no such calls or legislation in this jurisdiction. For a detailed discussion on the challenges posed by the COVID-19 outbreak and the making and or execution of Wills see *inter*



alia Horton D., and Weisbord R.K *COVID-19 and Formal Wills*, Stanford Law Review Online, Volume 73, May 2020 (available at: <https://review.law.stanford.edu/wp-content/uploads/sites/3/2020/05/73-Stan.-L.-Rev.-Online-Horton-Weisbord.pdf>), Crawford, B.J. *et al Wills Formalities in a Post-Pandemic World: A Research Agenda*, University of Chicago Legal Forum, Article 4, Volume 2021 (available at: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1685&context=uclf> ),Storrow, R F. *Legacies of a Pandemic: Remote Attestation and Electronic Wills*, Mitchell Hamline Law Review: Vol. 48: Iss. 4, Article 1. 2022 (available at: <https://open.mitchellhamline.edu/mhlr/vol48/iss4/>).In Tanzania, the confounding effects of the disease were never a reason for not following any law in this country as can clearly be seen in the various guidelines that were issued by the then Ministry for Health, Community Development Gender and Elderly and Children some of which counsel appended to his submission.

I am of the view that the document attached to the Petition cannot be legally admitted as the last Will of the deceased to grant letters of administration with the Will annexed. Under the circumstances the application is not granted for the Will is bad in law for lacking in form.



The Petitioners and or anyone else who is qualified to do so may if they so wish proceed to apply for letters of administration of the estate of the deceased DOMINIC FRANCIS RWEHUMBIZA. Accordingly, the Petition is rejected. No order as to costs.



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**A.A. OMARI**

**JUDGE**

**09/02/2024**

Ruling delivered and dated 09<sup>th</sup> day of February, 2024 in the presence of Bernard Mbakileki and Mary Pancras appearing for the Petitioners who are also present in person, Thomas E. Rwebangira appearing for Deogratiaus Dominic Karulama a beneficiary who is also present in person.

A handwritten signature in blue ink, appearing to read "A.A. Omari".

**A.A. OMARI**

**JUDGE**

**09/02/2024**