IN THE HIGH COURT THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB – REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

PROBATE AND ADMINISTRATION CAUSE NO. 33 OF 2021

In the Matter of the Estate of Late

ABDUL HAJI LADHA.....DECEASED

BETWEEN

In the Matter of Application for Probate by

ANTONY AMIN HAJI..... PETITIONER

AND

In the Matter of a Caveat by

YASMINE HAJI..... CAVEATOR

JUDGMENT

Last Order date: 15.04.2024
Judgment Date: 15. 05.2024

M. MNYUKWA, J

It is prudent to acknowledge the importance of testamentary succession (Wills) in facilitating a smooth administration of estate. However, in some cases it can be a point of conflict and misunderstanding among the surviving beneficiaries who would dispute the validity, leave alone the authenticity of the same. But, all in all, societies should be encouraged to make Wills.

This case at hand has an interesting story whereby, the petitioner was once appointed by this court as executor of the estate of the late Abdul Haji Ladha, his father. The background facts leading to contention in this case are that; Parties are siblings whose father was the late Abdul Haji Ladha, who died at Dar es Salaam on 27/9/2018 as was proved by exhibit D1. Records show that on 29/10/2021 a petition was filed in this court by the petitioner who sought to be appointed as an executor of the Will and the Codicil which are allegedly to be left by the deceased. The petition was granted on 17/02/2022 by issuing letters of probate to the petitioner who was ordered to exhibit inventory within one month and final account of estate thereafter. Petitioner complied with the order by filing Form No. 80 and 81 which were inventory and final account respectively.

On 31/10/2022 this court was called upon to confirm the final account of the deceased's estate, but the same was stayed due to a reason that, there was an application for revocation of probate granted to the executor. And, the application was filed by caveator herein who is the deceased's daughter and executor's sister. The reasons advanced by the caveator (applicant then) were that, petitioner was fraudulently granted probate since he concealed facts material to the petition. She also

attacked the validity of the Will and Codicil by stating that the same were not genuine documents, as the true testamentary of the deceased was in the custody of Advocate Brooke Montegomery. After hearing of the application, probate granted to the petitioner (respondent then) was revoked after the court was satisfied that there was a misrepresentation on the part of the petitioner since he failed without sufficient cause to notify the caveator when filing the petition, but the learned trial judge directed that, since he did not determine the validity of the disputed Will, petitioner(respondent then) to remain the petitioner since he was an executor appointed by the Will and the caveator (applicant then) to bring her caveat against the petition. Caveator was given 30 days to file his caveat.

A journey to litigation in this case for the second time started on 03/1/2023 when a caveat was filed and caveator entered appearance by filing her affidavit objecting the petition on 21/4/2023. For clarity, without prejudice to the parties herein, I will not reproduce all the averments stated in the parties' affidavits, rather, I will confine myself to facts which are in relation to what is in dispute. It follows that in the caveator's affidavit, I will group her averments in two parts of which the first one is based on caveator's criticism on petitioner's credibility and integrity in

respect of the purportedly Will and Codicil and, secondly, her doubts on the validity of the said documents.

Starting with the first part, caveator averred in paragraph 9 to 9:10 that, petitioner took advantage of the deceased's mental health, which was described as unstable, confused and unable to control his faculties, to coerce, threaten and manipulate for his personal gain, for insuring that he obtains inhibited access and proprietary advantage during the deceased lifetime and after his passing. Among the allegedly actions which were stated to be done against the deceased by the petitioner was, coercing and threatening him into changing or writing his Will so that he can disinherit her and leaving the entire estate to the petitioner.

In paragraph 12 caveator claimed that, she is not in talking terms with the petitioner due to his harassment toward the deceased during his lifetime by forcing their father to give him money and properties. Again, she asserted that her relationship with his brother (the petitioner) deteriorated when he attempted to physically assault her at their father's funeral and threatened her on several occasion.

Furtherance, she averred in para 33 to 36 that petitioner has distributed to his wife and children deceased's properties, whereas deceased's furnitures were sold online. She also claimed that, petitioner

transfer to his wife her 20 shares in Kenyatta Drive Properties Limited (referred as KDPL) and other companies, and leased the deceased's property of KDPL at Oysterbay – Dar es Salaam to the Government of South Africa.

Coming to the second part, caveator disputed the validity of the purported Will and Codicil (henceforth "the documents"), in paragraph 17 of her affidavit she averred that, the said documents were forged and fraudulently made. She staged her reasons on four grounds that; ***one***, there is discrepancies in the deceased's signature on the purported Will, ***two***, unmarked thumb print as deceased's signature in the Codicil of which she alleged that she has never seen her father sign by thumb print since he was literate, ***three***, absence of a video recording of her father when signing these documents, as she averred that her father had a tendency of taking video recording whenever he was to sign a vital document and, ***four***, the maker/drafter of the documents were petitioner's advocate's and company secretary of the petitioner's company.

But all those reasons were qualified by what was stated by the caveator in relation to the deceased's physical and mental health during the making of the alleged documents. According to the caveator, as

KR 1

averred under para 19 and 29, at the time when the said documents were made, deceased was suffering from Alzheimer and dementia which affected his mental capability to make rational decision, let alone making a Will. She averred in paragraph 19 that the period within which the Will was made, that is 5/3/2018 was within the period when deceased flown to South Africa for treatment, when he was diagnosed and displayed the signs of dementia and frontal lobe dysfunction. And, on 15/9/2018 when Codicil was said to be made, caveator alleged that, at that time deceased was suffering from progressive Alzheimer's disease and he was confused. Reference was made to annexure YH-7.

Petitioner countered all the averments which criticized his credibility by stating that in 2018 he was the one who was living with the deceased in Tanzania while caveator moved to Switzerland and refused to come and visit their father. He stated further that, he was the only person who was taking care of their father, hence he disputed the fact that he took advantage of his health for his own gain as alleged by the caveator. It was his averment that the allegation stated by the caveator in her affidavit was baseless and unfounded.

Disputing what was averred in paragraph 17 of the caveator's affidavit petitioner averred in paragraph 35 – 38 of his counter affidavit

that, deceased had different kind of signature and style in executing documents. Reference was made to annexure AH3 and AH9. As for the Codicil he stated that, deceased stopped writing on his own sometimes in May 2018, and instructed his personal secretary to write for him whatever he wanted to be written in his diary. According to the petitioner, the thumb print appearing in the Codicil belonged to the deceased.

Petitioner averred further that, the reason for deceased to use advocate Fayaz Bojan and Gerald Nangi to draft his documents was best known to deceased himself, and he disputed the claim that those advocates are his personal lawyers and company secretary.

Regarding the deceased's mental health, petitioner averred that deceased was mentally stable despite him being forgetful, which he considered to be caused by his elderly age. He asserted further that, deceased used to record most of his daily activities in his diary, according to him, that signifies how stable his mental (brain) was.

After consideration of what has been stated in the parties' affidavits, it has to be noted that, when the caveator entered appearance, the matter turned contentious and it took as nearly as a form of a suit whereby, petitioner becomes plaintiff and caveator becomes defendant as required under section 52(b) of the Probate and Administration of Estate Act, Cap

352 R.E 2002 of which, in this case was complied with. Before hearing of the evidence and testimonies, parties agreed on the issues for determination which are;

i. *Whether deceased left a Will*
ii. *Whether the Will is valid*
iii. *To what relief are the parties entitled.*

At the hearing the parties were represented. For the petitioner was Norbert Mlalwe, learned advocate, assisted by Benedict Shabakaki learned advocate, while caveator was represented by Jovinson Kagirwa and Simon Lymo.

The hearing started with PW1, Antony Amin Haji who adopted his counter affidavit to be part of his evidence, and testified that he is the older son of the deceased who died on 27/9/2018 in Dar es Salaam. He said that, deceased had two children, him and his sister (caveator) who lives in Switzerland. He stated further that his father died at the age of 87, according to him he died due to his old age, and he added that despite his old age he appeared 10 years younger since he was physically and mentally fit.

Petitioner testified further that, in 2018 before he passed, he was able to make follow up on his passport and National identity Card on his

own. He also said, he managed to travel to Switzerland and South Africa, and in all that places deceased was able to walk and interact on his own. Petitioner testified to have found a Will (exhibit P5) and Codicil a year after the death of his father which he believed to have been the last testamentary of the deceased after the first one which was said to be in the custody of advocate Brooke being torn by deceased himself. He stated that, other two copies of the Will were kept at RITA and at the Mosque.

PW1 went on to testify that, the Will was made on 5/3/2018 and was drafted by advocate Fayaz Bhojan and witnessed by two witnesses. He asserted that, deceased had a diary in which he used to write his events of which, he said even issues of his Will was written in his diary. He also said, the Codicil was drafted by advocate Gerald Nangi on 15/9/2018 and witnessed by Magreth Kijazi and Mehseen Khatri. Petitioner claimed to have informed and sent copies of the Will and Codicil to the caveator in Switzerland. Petitioner maintained that his father was of good health be it physical or mental.

When cross examined about deceased's trip to South Africa, he stated that his father went for medical purposes where he was attended by Dr.Smith who is the neurologist. He testified that the purpose of meeting a neurologist was because deceased started to be forgetful.

In proving his case, petitioner brought nine witnesses, among them is PW3 Faayaz Amirali Bhojan who is a lawyer and advocate testified to being the one who drafted the Will. He stated that he knew the deceased who was his fellow member of Ismailia community. And that, on 5/3/2018 he drafted a will for him.

When the witness was cross examined, he denied the fact that he was the CMC Automobile Company secretary (lawyer) despite the fact that he admitted to have known the petitioner for about 7 years. He said he was not around when deceased signed the Will but he stamped the Will after he had seen the signatures of deceased and his witnesses.

Alfarhan Dewji (PW5) and Imtiaz Haji (PW10) these two witnesses are the ones who witnessed the deceased Will, their testimony is mostly the same. They testified that deceased was their fellow worshiper at Ismailia Community since they were leaders of Jamat Community of Ismailia. They went further to testify that, on 5/3/2018 they were approached by the deceased and asked to sign his Will. They said, after the deceased signed first, they also signed as witnesses.

When cross examined PW10 testified that, he knew that deceased was of sound mind when he interacted with him at the signing of his Will. He also admitted to discrepancies in signatures, appearing on the same.

Moreover, petitioner called Nurbanu Rahim Anand (PW8) the administrative Officer of Ismailia who testified that, deceased was a member of Ismailia Community and he deposited his Will at the Community. He stated that the Will was deposited on 19/4/2018 and was registered in the register as 776.

Sailing in the same boat, petitioner (PW1) called an officer from Registration, Insolvency and Trusteeship Agency (RITA) one, Joseph Jackson Mwakatobe (PW6) who testified that, he had brought in court a Will of a deceased which was kept at their office. He stated further that, in the register book the Will was deposited on 30/8/2018.

Further, he called PW7, Gerald Nangi who testified that he is an advocate and on the material date which was 15th of September, 2018 he drafted the Codicil of the late Abdul Ladha.

When he was cross examined, he said he was instructed by the deceased to prepare a Codicil. He asserted further that, deceased called him through a mobile phone but he talked with PW9 who told him that, he was needed by the deceased. He then said, the contents of the Codicil are instructions of the deceased who told him that he wanted to amend para 3 of the Will. He continued to testify that, deceased was normal and

he used to call him "dogo". He testified that, he was the one who told him to either sign or put his thumb print.

Witnesses to the Codicil were brought to testify too. Whereby, Mehseen Khatri who is an employee at CMC Automobile testified as PW2, and stated that he worked for the deceased for 16 years, and on 15/9/2018 he was asked by the deceased to sign a Codicil as a witness.

When cross examined, he stated that he signed the Codicil after the deceased signed by his thumbprint. Again, he testified that at that time deceased was of good health.

Another witness to the codicil was PW9, Magreth Kijazi who testified that she worked as a deceased's personal assistant for 18 years. She stated that, deceased was a principled man, who used to write his things in his diary, whereby sometimes she was instructed to write for him in his diary. PW9 testified further that, on 22/2/2018 she escorted the deceased to the office of Advocate Brooke where he torn his Will and deleted the same from the computer. It was her testimony that on 15/9/2018 she was instructed by the deceased to call advocate Gerald Nangi through his mobile phone then they talked. And on the same day she signed the Codicil as a witness.

PW1 brought Dr Samina Somji (PW4) who is an internal medicine consultant at Aga khan hospital. PW4 testified that, he admitted the deceased at the hospital on 19/9/2018 and was diagnosed with myeloproliferative disease. She testified further that, during the time of deceased's hospitalization he was administered with several medications which helped him to regulate water in his body and for heart treatment. She also said, the mental status of the deceased was full conscious since he was able to reply to questions which were posed to him.

Petitioner closed his case after all his witnesses have testified. It was then the caveator's turn to substantiate her case.

Caveator testified as DW2 and told this court that she is opposing the grant of probate to the petitioner due to the reason that her father did not leave a Will. She asserted that, she is the deceased's daughter living in Switzerland. She testified further that her father died on 27/9/2018 at the age of 87 years. She added that her father was a successful businessman who own a Range Rover dealership company (CMC Automobile) and several other companies including Kenyatta Drive Properties Laibon Investment (KDPL). She stated more that, deceased left two houses, no. 3 and 14 and 18 apartments in Oysterbay, Dar es Salaam. She went on to testify that her relationship with PW1 is bad and they did

not get along for 20 years. She stated more that, after the death of her father, she was told by PW9 through text message that the petitioner (PW1) and his finance director Hanif Habit wrote the deceased's Will, and when she asked PW1 he admitted.

DW2 continued her testimony by stating, that the alleged dates when the purported documents were said to be drafted was the time when deceased was incapable of recognising people to the extent that, even a maid who used to bring him food was not recognised. According to her, since the deceased used a thumb print to sign, he was not in a position to draft legal document. She then said, she is discrediting the Codicil since it was drafted by the petitioner's lawyer and witnessed by his employees.

DW2 went on to assert that, deceased was diagnosed with Alzheimer diseases hence he was confused, depressed and suicidal. According to her, he was not capable of making a Will nor a Codicil. She also said, when deceased went for second visitation in South Africa his dementia was worse and doctor's remarks was that he was incapable of drafting a Will or a Codicil.

It was her further testimony that, she is disputing a Will because it mentioned a property which did not belong to the deceased but to KDPL

Company. Also, she added that deceased did not own a bank account outside Tanzania since his 7,000,000 EURO was transferred to her account for payment of mortgage debts which were settled off by 15/9/2018, she therefore wondering why the same is in the Codicil. She therefore prayed this court to invalidate the Will and Codicil.

When cross examined, DW1 admitted to have a phone call with the deceased on 14/9/2018 about the money, but she testified that at that time her father was of unsound mind and was couched on the call. She stated further that in the audio clip she mentioned 9,000,000 Euro and not 7,000,000 Euro.

DW2 brought one witness who was Dr. Marcelle Rey Smith a neurologist who based in South Africa. Dr Marcelle testified as DW1 and told this court that, in 2018 she served as a private practice neurologist at Sandton Medi Clinic in South Africa. She added that a person is referred to a neurologist if he has conditions which affects the brain. She stated further that, she knew the deceased whom she attended for the first time on 13/2/2018, she then said she diagnosed him with Alzheimer disease which is the progressive decline of brain function, and his mental status was 18/30 while the normal range is 30/30. She went on to state that on August, 2018 during the second visit the mental status of the deceased

declined and he scored 14/30, she added that the mental status was worse compared to the first visit, hence was incapable of making decision.

When she was cross examined, she testified that she was told by DW2 that his father was suicidal. And when she was asked if a person of Alzheimer can make a Will, she testified that he/she can. She added that a person with 18/30 score can make a sound decision. However, she stated that, she was not sure if deceased could have made an informed decision since her mental status dropped by 4% on the second visit.

After the testimony of the caveator (DW1) and her witness, defence case was closed, and learned advocates for the parties prayed for a leave to file final submissions. Leave was granted, and the parties filed their respective submissions on 25/4/2024. I appreciate that the same were filed on time. However, I shall not reproduce them in this judgment but the same will be referred to in the course of deliberation of the issues.

Having heard the witnesses and examined the pleadings and exhibits tendered in court, I would like, before dwelling into determination and deliberation of issues, to express my heartfelt gratitude to the learned advocates for their commitment and tireless effort into making sure that this case comes to an end. I appreciated their hard work.

Before going further, it is undisputed that in the purported Will deceased opted that, Islamic rules should not be applicable in the administration of his estate. The question now is, what law should be applicable on determination of the validity of the Will. To answer this question, I am not far from what Mr. Kagirwa learned counsel as suggested, however, my mind is settled that Indian Succession Act, No. 39 of 1925 should apply.

Coming now to the deliberation of the issues stated hereinabove, the first issue is, **whether deceased left a Will.**

To begin with, it is settled and expressly provided under section 2(1) of the Probate and Administration of Estate Act, Cap 352 R.E 2002 (the Act) that, a Will is the legal declaration of the testator's intention on how his property will be carried into effect after his death. For ease of reference this provision reads:

> *"**will**" 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.*

In this case at hand, when petitioner (PW1) alleged that his deceased father left a will, this fact was disputed by the caveator (DW1) who firmly said, their father did not leave a Will. However, exhibit P5 is

prima facie evidence that the same is purportedly to be the Will of the deceased. But who has the duty to prove, this question sends us to the rules of evidence.

Indeed, I am alive to the rules of evidence where, for a fact to be believed in court its existence must be proved. That is to say, he who alleges must prove. And, it is settled that in civil cases proving is on the balance of probability since the burden of proof lies on that person who would fail if no evidence were given on either side. Section 110 and 111 of the Evidence Act, Cap 6 R.E 2019 (TEA) provide to that effect, for ease of reference the same are herein reproduced;

> *110.-(1) 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.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*

The Court of Appeal in the case of **Berelia Karangirangi vs Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 CAT (Unreported) insisted that, a duty to prove facts in court is on the person who alleges.

Similarly, in this case petitioner discharged this duty by calling PW3 who testified to have drafted the deceased's Will and confirmed that exhibit P5 is the Will which he drafted. He also called PW5 and PW10 who testified to have witnessed the deceased Will which they identified in court as exhibit P5. Lastly but not least, he called PW6 and PW8 who told this court that they were the custodian of copies of the deceased' s Will which they brought in court.

Therefore, having all the testimonies from the drafter of the said Will, witnesses and custodians of the same, whom, as a matter of law, were in compliance with the rules of evidence provided under Section 62(1) of TEA, which states that;

> *62.-(1) Oral evidence must, in all cases whatever, be direct; that is to say-*
>
> *(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;*
>
> *(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;*
> *(c) if it refers to a fact which could be perceived by*

any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds.

It will therefore be imprudent to be in denial. That being said, I hold that the first issue is answered in positive. However, its validity is a question to be determined in the second issue.

The second issue is **whether the Will is valid.**

In determining this issue, I agree with Mr. Kagirwa learned advocate that, the Court of Appeal in the case of **Mark Alexander Gaetje and 2 Others vs Brigitte Gaetje Defloor**, Civil Revision No. 3 of 2011 CAT at Dar es Salaam, enumerated questions or issues which when proved will validate or invalidate the Will. For ease of reference the Court held that;

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; in case where the testator has disabilities like blindness, deafness or illiteracy, whether or not the contents of

the will were made knowledgeable to him by reading over, etc and he had granted his approval; whether there was undue influence of not; whether there was forgery and fraud or not.

Coming to this case at hand, it is on record that caveator is disputing the validity of the Will of his father by alleging that, deceased was incapable of making a Will due to his unsound mind which was caused by Alzheimer desease, and if he made the same, was therefore made under undue influence of the petitioner. She also challenged the signature of the deceased appearing on the purported Will that the same is forged, leave alone the drafters of the said documents who are said to be the petitioner's lawyers. And, she complained further that she is disinherited by the Will and the same bequeathed a property which did not belong to the deceased.

Starting with the *capacity of the deceased to make a Will and Codicil.*

It is on record that, at the hearing of the caveator's case, she alleged that his father was mentally unstable since he suffered from Alzheimer diseases which affected the exercise of his natural faculties of the brain. To collaborate her testimony, she called DW1 who confirmed the same, and testified that deceased's mental status at the first visit was 18/30 while at

the second visit which was on August 2018 was 14/30. Though, she did not tender any medical report for the same.

Moreover, in the caveator final submission, learned counsel argued that deceased was incapable of making a Will and a Codicil in 2018 since he suffered from deseases which affected his brain faculties. His argument was that, due to his mental instability he ends up disinheriting his own daughter. He therefore prayed for the Will and Codicil to be declared invalid. To bolster his argument, he cited the cases of **Ramnik Vaghella vs Mahendra Veghella** [2000] TLR 223, **Bank vs Goodfellow** (1870) QB 549 and **Benson Benjamin Mengi and 3 others vs Abdiel Reginald Mengi and Another**, Probate and Administration Cause No. 39 of 2019.

On the other hand, these facts were disputed by the petitioner (PW1) who asserted that his father was sometimes unwell due to his age, but his mental status was active. He testified further that, deceased used to write his events in his diary and the way he used to write his emails verified that he was of sound mind. Also, PW2, PW3, PW4, PW7, PW9 and PW10 testified that deceased was of sound mind at the time they had contact with him. In the final submission Mr. Ishabakaki learned advocate argued that, the evidence which were tendered in court by the petitioner

substantiated that, deceased was of sound mind at the time of making the documents.

Considering the rival evidence and submissions of the parties, it is best at this juncture to first identify facts which are not in disputes. It is not in dispute that deceased died at the age of 87. It is also not in dispute that deceased visited a neurologist in South Africa twice, and it is undisputed that deceased was diagnosed with Alzheimer after showing signs of forgetfulness.

Now, the issue here is, whether deceased had capacity to make the purported documents. The first and foremost, as a matter of law, I take cognizance of DW1 expert opinion in relation to deceased's mental capacity at the time when the purported documents were made. However, I am of the humble view that, the said evidence was antagonised by PW3 and PW7 who testified that, at the time the purported documents were drafted, deceased was of sound mind since he was the one who gave out the contents of the same. The same was verified by PW2, PW5, PW9 and PW10 who categorically confirmed that deceased was of sound mind at the time of signing the documents. For instance, PW10 who was the religion leader when cross examined, he stated that; for clarity let me quote what he said;

It is true that before I signed, I satisfied myself the late Abdul Haji was of Sound mind. I knew it when I interacted with him. He was able to walk in my office which was 100 metres from where he was.

Considering the foresaid testimony of PW10, who was a religion leader of Ismailia Community at that time, I am therefore hesitant to assume that, a religious leader would deliberately sign a Will made unconsciously.

Also Dr. Samina Somji (PW4) who admitted the deceased at Agakhan hospital on 19/9/2018 verified that, deceased's mental state was stable, since he was able to interact by answering questions which were posed to him during the admission.

In the case of **Ramnik Vaghella vs Mahendra Vaghella (supra)** the Court of Appeal held that;

The opinions of experts are relevant but not binding; the weight to be attached on these opinions would depend on the nature of each case. Moreover, there are many matters of common experience in respect of which persons with no special qualification are permitted to state what is real a matter of opinion. Such an opinion is no less relevant than the opinion of a trained person.

Guided by the foregoing decision, I subscribe to the same and agree that, opinion of the witnesses to the documents are relevant.

Moreover, petitioner tendered exhibit P4 which was deceased's diary, in which, he used to write most of his daily activities. Looking and reading what deceased used to write, no reasonable man would question the deceased's mental state. I am saying so basing on the time around when deceased made his first visit to DW1, of which he indicated in his diary on 13th of February 2018. On this particular date he wrote that;

"App with (new lady Dr) nerologe... I am forgetting things."

This statement by the deceased shows that he knew the purpose of his visit to DW1, therefore it goes without saying that, his mental status was sound contrary to what DW1 testified when cross examined, when she said at the first visit deceased's mental status was not good. While on the other hand, the cognitive score of the deceased according to DW1 was 18/30 and she admitted that with the said result a person can make rational decision. For ease of reference let me quote her testimony;

> *The cognitive test score in the first visit of the late Abdul Haji was 18/30. With this score, a person can make a sound decision, it depends on the circumstance of each and every patient.*

Considering the above testimony, it is clear that, the same corroborated what were stated by the petitioner's witnesses that, at the time when the purported documents were made, deceased was of sound mind.

Again, petitioner tendered exhibit P11 which was an audio recording of a conversation between DW2 and the deceased, which was conducted and recorded on 14/9/2018. The conversation between the two showed that deceased was aware of, *first*, the person he was talking to, and *second,* the aim of their conversation. Same, for DW2 who conversated accordingly. When I heard the conversation, I had no doubt in my mind that, deceased understood what that conversation was all about.

However, DW2 disputed the same by contending that, deceased was couched by PW1 and another person named Hanif, who, according to her, were the one who recorded the same. She stated that, his father did not know how to even dial a number in his phone. Still, her contention was not substantiated.

On my part, I am not in agreement with DW2 that deceased did not know how to even dial the number in his phone, because of what PW2 testified in re - examination when he said, he was always called by the

deceased when his computer had problems. It is apparent that, deceased knew how to even use a computer, leave alone a phone.

Depending on the foregoing analysis of the evidence, it is without doubt that PW1 proved that deceased was of sound mind when making a Will and a Codicil. Therefore, DW2 contention about capacity of the deceased in making the purported document is dismissed.

Another complaint by DW2 is that, *the purported documents were made under undue influence*. In her affidavit under para 9.7, 9.8 she averred that PW1 used to coerce, threaten, manipulate and withhold vital services against the deceased, which made her believe that the Will was obtained by fraudulent means. In the final submission in support of the caveat, Mr Kagirwa learned advocate argued that there were several incidents which displayed elements of undue influence. He said, P13 were payment vouchers of the deceased, that shows payments were made around the time when the documents were made. He also said that, the fact that PW1 testified to have escorted his father at the mosque to sign his Will shows element of undue influence.

With all due respect to the learned counsel, I think Mr. Kagirwa has forgotten the cardinal principle of he who alleges must prove. Unfortunately, in his submission, learned advocate was speculating facts

and creating doubts in petitioner's credibility during his testimony instead of producing evidence to prove his contention. In the case of **Pauline Samson Ndawavya vs Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 CAT at Mwanza, the Court held that:

> *Be it as it may, we think the success of the appellant's case did not depend on the respondent's credibility. It depended on the appellant discharging her burden of proof on the required standard in civil cases relative to the issue to be proved.*

Also, the law under section 112 of the Evidence Act, Cap 6 R.E 2019 is very clear that, any person who wishes for the court to believe in the existence of any fact, has a duty to prove. The said provision states;

> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact shall lie on any other person.*

Guided by the decision and provision above, I regret to say, a complaint by the learned counsel on undue influence was not proved, rather the same was based on assumptions. Adding salt to the wound, it is the content in Exhibit P4, specifically on 3/4/2018 which, deceased clearly indicated that he received salary from PW1. His words were, I quote:

9 AM Antony came with my salary 4.317 900/=.

It is from the foregoing quotation, my mind is settled that, these payments were neither targeted nor influenced. But, considering Exhibit P13, I humbly think, the same were a company arrangement of which deceased was aware of, and the same were received voluntarily by him. I also fortify my stance with deceased's signatures which appears on those payment vouchers as a proof that, deceased received those payment voluntarily.

Another incident which was complained of, was the fact that PW1 testified to have escorted deceased to sign his purported Will at the mosque. This complaint is also unfounded because PW5 and PW10 testified that at the time when they signed the Will, PW1 was not there. PW5 testified that PW1 was outside in his car which I believe, was the one who used to bring deceased at the mosque. Also, PW10 testified that before he signed the Will, he was satisfied that the same was voluntarily made.

That being said I hold that, a complaint by the caveator (DW2) that the purported documents were obtained by undue influence are just mere words with no evidential value.

Turning to another complaint, is *discrepancies of the signatures in Exhibit P5.* Caveator (DW2) complained that the difference in deceased's signatures on Exhibit P5 shows that the same was forged. This complaint was disputed by PW1 who maintained that, those signatures belonged to the deceased who had different ways of writing his signature.

Upon the rival contention of the parties on the same, I took a keen scrutiny on Exhibit P5, whereby, I confirmed that, the format of those signatures is the same but how the deceased's closed them at the end varies. These signatures consist of three to four lines at the beginning with a closed or an open end. Some are totally closed at the end, while others are open. However, when I perused the records, I realised that Exhibit P12 has the same signature with an open end, while Exhibit P13, payment vouchers have the same signatures as those appearing in the Will, Also, Exhibit P2 which is the Citizen Identity Card, has a deceased's signature with a closed end.

Further, I noticed that the signatures of the deceased in the year 2006 and 2012 as transpired in Exhibit D2 had a different format at the end, that is, were neither open nor closed, but there was a similarity on their alignment at the beginning. They both consist of four lines at the beginning similar to those appearing on other documents stated above. It

follows therefore that, on the face of those documents, it is prima facie that the signatures on the same belonged to the same person, who is the deceased. But, the duty to prove otherwise lies with a person who disputed the same.

Though, it is without doubt that, as a matter of law petitioner (PW1) had a primarily duty to prove that, the purported Will was executed by the deceased who affixed his signatures. And, in this case he has discharged his duty by calling witnesses to the said Will, who verified that they saw the deceased affixing his signature when executing his Will, therefore, the signatures appearing on Exhibit P5 belonged to the deceased.

It appears therefore that, since caveator (DW2) alleged that Exhibit P5 was forged, the burden to prove the same shifted to her. But it is unfortunate that, no evidence was availed to substantiate her claim. She only asserted that her late father did not leave a Will, and that which was presented in this court was made by PW1. She testified further that, she came to the knowledge of Exhibit P5 being made by PW1 after she asked PW1 himself who answered in affirmative and she was also told by PW9 Magreth Kijazi.

It is trite law that, hearsay evidence cannot be admitted in court, because, the rules of evidence are categorical under the provision of section 62 (1) of the Evidence Act, cap 6 R.E 2019 that, oral evidence must, in all cases whatever, be direct. The law states: -

> *Oral evidence must, in all cases whatever, be direct; that is to say-*
>
> *(a) if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;*
>
> *(b) if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;*
>
> *(c) if it refers to a fact which could be perceived by any other sense, or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;*
>
> *(d) if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion or, as the case may be, who holds it on those grounds:*

Therefore, the fact by DW2 that she was told by PW1 that he made the disputed Will contradicts with the foregoing provision and the content of Exhibit P9 which are email correspondence between PW1 and DW2 on the purported documents. From the same, it is clear that DW2 was asking

to be sent a Will which was purportedly to be left by the deceased. The same is proved by Exhibit D6 which is an email of DW2 to her lawyer expressing her worry on the documents, but she did not tell her lawyer that the Will was made by PW1. The question is, was that fact not important to be disclosed to her lawyer.

Be it as it may, I still hold the same view that, caveator (DW2) failed to prove forgery to the required standard. I fortify my stance with the decision of the Court of Appeal in the case of **Pauline Samson Ndawavya vs Theresia Thomas Madaha (supra)** whereby in this case fraud was alleged, and the Court emphasized that proving fraud should be above that which is on balance of probability. The same is herein reproduced;

> *It may not be completely irrelevant to observe that since fraud imputes criminal offence proof of it ought to have been above mere preponderance of probability.*

It follows therefore that, a complaint on forgery is unfounded hence dismissed.

Again, DW2 contended that, *she was disinherited from the estate of her father.* She testified that Exhibit P7 disinherited her from the estate since in para 2, she is given money remained in the deceased's bank

accounts, of which she said, she did not think if her father had bank accounts. In the final submission, learned advocate argued that DW2 was given part of the family money which was not stated in the Will. according to him there is no money in Switzerland, since the said money was used to pay mortgage debts, he therefore contended that DW2 was illegally disinherited. To bolster his argument, he cited rule 31 to 34 of the Local Customary Law (Declaration) (No.4) Order, GN No. 436 of 1963 and the case of **Elizabeth Mohamed vs Adolf John Magesa** [2016] TLR 114

To begin with, it is in record that para 3 of Exhibit P5 which deceased bequeathed his shares in a stated property was changed by para 1 of Exhibit P7 whereby, the same were given to PW1. However, para 2 of Exhibit P7 bequeathed equally all monies which are remaining in any of the deceased's existing bank accounts. And also, she was required to return 50% of the family money.

It appears from the above that, the issue to be determined here is, whether, as far as para 2 of Exhibit P7 is concerned, caveator (DW2) is disinherited. The answer to this issue is in negative due to the fact that, as far as I am concerned I humbly think, para 2 of Exhibit P7 changes the entire para 5 of Exhibit P5. I say so because in para 5 of the Exhibit P5 deceased bequeathed the money in his bank accounts to PW1, later on in

the Codicil (exhibit P7) he bequeathed his money in any of his existing bank account to both PW1 and DW2. To my understanding I think para 2 of the Codicil qualifies by altering what was stated in para 5 of the Will which gave the money to PW1, by giving the same to both of them. Henceforth, an allegation that caveator was disinherited is misconceived.

On the other hand, let me talk about 50% which DW2 is instructed by para 2 of the Codicil to return to PW1 as a family money. Regarding the same, it is not in dispute that in 2017 deceased transferred 7,000,000 Euro from his bank account in Switzerland to DW2's account. This was testified by DW2 herself. But she alleged that the money was used to clear mortgage debts as she was instructed by the deceased, though she did not produce any evidence to substantiate her assertion.

Further to that, her assertion that the said money was used to clear debts contradicted what she said to her father (deceased) during the conversation they had on 14/9/2018 when she was asked about, what I believe to be, the same money as stated in para 2 of the Codicil. In Exhibit P11, when DW2 was asked about the money, she said she invested all the money in a long - term investment and had no access to the same. Deceased was curious that, if she invested all the money why he was not

receiving any interest. But DW1 insisted that she invested all the money and had no access.

It is from the above evidence that I asked myself, why should DW2 have two different version of a story regarding the said money. If she was truly instructed by the deceased to pay mortgage debts as she testified, why did she lied to him that she invested all the money, instead of reminding him that she cleared the debts. Also why she did not have evidence to prove clearance of the said debts. Having these questions remained unanswered, it raises a red flag that, DW2 might not be truthful on the same, hence, it draws an inference that, the money which deceased referred to as "family money" in the Codicil, still exists. And I can agree less.

However, learned advocate for caveator in his submission argued that since deceased referred the same as family money, he had no right to bequeath it, as the same did not belong to him alone but to the family. With respect I think this argument by the learned counsel is unfounded since, it was not established or proved in court that the parties have their claim/share in the said money. Still, Exhibit P11 proves that, the money belonged to the deceased who wanted his money back.

Moreover, Mr Kagirwa contended also that, Codicil is invalid for stating about the family money which was not stated in the Will. This argument is misconceived because, as far as the meaning of Codicil is concerned, I humbly think, it is immaterial if what is stated in the Codicil was not stated in the Will. Also, it is not a must that what is stated in the Will has to be referred to the Codicil. Henceforth this is because Codicil is an instrument of a Will which is used to alter, change and add to it disposition. Section 2 of PAEA provides that;

> *"codicil" means an instrument made in relation to a will, and* ***explaining, altering or adding to its dispositions;***

It follows therefore that, if a Codicil is made for adding to the disposition made in the Will, it creates a room for new properties which were not referred or stated in the Will to be disposed of, and that is the essential function of the Codicil. Henceforth this is what para 2 of Exhibit P7 is all about. That being said, an objection by caveator that she is disinherited has no merit, it is hereby overruled.

Another complaint by DW2 in her affidavit and her testimony in court was that, the drafters of the purported Will and Codicil are PW1's lawyers and company secretary. While the witnesses to the Codicil were PW1's employee at CMC Automobile company.

However, before going further, it has to be noted that in the caveator's final submission learned advocate argued on a different complaint, which he titled the capacity of the witnesses. Where, he contended that witnesses to the Will must know the contents of the Will, so that in case of ambiguity or destruction they can testify on the same.

Learned advocate contented further that, in this case the witnesses who witnessed the documents did not know the contents of the documents as required by law which renders the Will and the Codicil illegal. To support his argument, he cited Rule 19 of GN No. 436 of 1963 and the cases of **Asha Shemzigwa vs Halima A. Shekigenda** [1998] TLR 254, **Jackson Reuben Maro vs Hubert Sebastian**, Civil Appeal No. 84 of 2004 CAT at Arusha.

As I have stated hereinabove, the objection regarding the capacity of witnesses as argued in the caveator's final submission was not pleaded in caveator's affidavit. What the learned advocate did was to invent a new wheel in his submission. While it is settled that parties are bound by their pleadings, its logic is to protect the other party who would be taken by surprise when the facts which are not pleaded, are alleged or argued.

However, despite what I have stated above, I humbly think, at this juncture I should determine the role of witnesses as far as the execution

of the Will is concerned. The law under the provision of section 63 of the Indian Succession Act, No. 39 of 1925 is very clear that, a Will shall be executed by the testator by affixing his signature therein. And, shall be attested by two or more witnesses who have to see the testator affix his signature or mark on the Will. For clarity, the provision which provides for the same is herein reproduced;

> *63. Execution of unprivileged wills: —*
>
> *Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:*
>
> *(a) 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.*
>
> *(b) The signature or mark of the testator, or the 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.*
>
> *(c)* ***The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal***

acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall 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.

It is appearing from the above provision that, the contention by the learned advocate that a Will must be read by the witnesses is misleading and misconceived, since the same is not a requirement of law. The law needs only, for the witnesses to see the testator affix his signature on the document. And, the purpose for the same, is to prove that, the execution of the Will was done voluntarily.

Again, learned advocate contended further that, every witness in this case signed the document on his own time. I must say, this argument by the learned counsel is misleading because, when PW5 was testifying in chief he stated that, I quote;

'On the 5th March of 2018 I was in the mosque with my fellow chairman who is Imtiaz Haji. I remember on that day Mr. Abdual Haji came in the mosque and asked me and my fellow chairman to sign the Will. I agree to sign. He started to sign, my chairman haji signed and I also signed.'

Even, PW10 testified to have seen the testator sign the Will, his answer when he was cross examined, he said;

> *It is true that I asked Abdul Haji to sign the Will first before me.*

The same was also testified by PW2 when he was cross examined, he stated that;

> *On the day of signing the codicil three person were present. I was with Mr. Abdul Haji, Ms Magreth and myself.*
>
> *Mr. Abdul Hajji signed first by his thumbprint then I signed*

It is therefore from the testimonies above, it is vividly that, a complaint by the learned advocate is unfounded. Besides, the law is expressive that it is not necessary that more than one witness be present at the same time. This objection is overruled.

Last but not least, the learned counsel argued that, deceased illegally bequeathed in his Will a house No. 3 Kenyatta Drive which is the property of Kenyatta Drive Properties Limited. His contention was, since that property was not owned by the deceased, it was not supposed to be included and disposed of by the Will. According to the learned counsel the same invalidates the Will.

On the other hand, leaned counsel for the petitioner argued that, this complaint was not stated in the caveator's affidavit, therefore, is unpleaded fact. But Mr. Kagirwa contended this argument by submitting that, since the same was introduced during hearing and the parties confirmed that the said property did not belong to the deceased, the complaint should be considered by this court.

As far as this complaint is concerned, I agree with Mr. Kagirwa that, even if the same was not stated in the caveator's affidavit, but during the hearing, the parties have addressed the court on the same. I humbly think the same should be considered and determined.

Therefore, the issue now is, whether disposition of House No. 3 Kenyatta Drive by the Will invalidates the same. Mr. Kagirwa contended that disposition of the said house invalidates the Will. He supports his argument citing the case of **Benson Benjamin Mengi (supra)**. Whereas, Mr Ishabakaki learned counsel argued that, caveator ought to have tendered evidence to prove ownership. However, he asserted further that the same does not invalidate the Will. He cited the case of **Terry D. Kingologo vs Wendelin Dagobert (Executor of the Estate of the late Dagobert John Komba)** Civil Appeal No. 15 of 2021.

Considering the rival submission of the parties, I am alive to the meaning of a Will, whereby a testator, as a matter of law, is required to dispose of the properties which form part of his estate. This means, he is deemed to bequeath and give properties which belong to him. Now, one may ask, what if testator bequeathed a property which does not belong to him, is this fatal. The answer to this question depends on how the same prejudiced the parties (beneficiaries).

As for this case at hand, it is undisputed that the House No. 3 Kenyatta Drive is owned by Kenyatta Drive Properties Limited, so the same was improperly bequeathed by deceased. However, the parties have not established how the same prejudiced them while they all knew that, that house belonged to the company and the parties have shares thereto. That being said, it is my view that, instead of invalidating the said Will, it is prudent to strike out the said property from the Will, since there is no dispute between the parties as to whom House No. 3 belongs to. This objection is also overruled.

Considering all that I have stated hereinabove, this issue as to whether the Will is valid, is answered in the affirmative.

The last issue is, **to what relief are the parties entitled.**

This issue should not labour me much, since the two issues above are answered in the affirmative, I therefore dismiss the caveat for lack of merit, and appoint the petitioner as the executor of the deceased's estate. Letters of probate to be issued.

Since the parties are siblings, I make no orders as to costs. It is so ordered.

Right of appeal explained to the parties.

M.MNYUKWA

JUDGE

15/05/2024.

Court: Judgment delivered in the presence of parties' counsels and petitioner in person.

M.MNYUKWA

JUDGE

15/05/2024.