IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

ARUSHA SUB-REGISTRY

AT ARUSHA

PROBATE AND ADMINISTRATION CAUSE NO. 14 OF 2023

IN THE MATTER OF THE PROBATE AND ADMINISTRATION OF ESTATE

AND

IN THE MATTER OF ADMINISTRATION OF ESTATE OF THE LATE EFREM HIPOLITE LYARUU

AND

IN THE MATTER OF APPLICATION OF PETITION FOR BROBATE BY ALPHONCE EFREM LYARUU.

ALPHONCE EFREM LYARUU _____ **PETITIONER**

VERSUS

KARIM E. MOSHI _____ **CAVEATOR**

RULING

19/03/2024 **&** *24/05/2024*

BADE, J.

The facts giving rise to this Ruling are that the late Efrem Hipolite Lyaruu died testate at Mount Meru Hospital, Arusha District within Arusha Region on the 31st day of December, 2022, and before he met his death, the late Efrem Hipolite Lyaruu had a fixed place of abode at Lemara within Arusha District. It was established that the deceased left behind what is purported to be his last Will and testament naming the Petitioner herein as the executor thereof.

The designated executor petitioned before this court to be granted probate, but before his petition could be heard, it met a caveat, with the caveator raising three points of preliminary objections, to wit:

i) That the Probate and Administration Cause No. 14 of 2023, filed by the petitioner in this Court on 12th day of July 2023 is incompetent before this Court as it contravenes section 55 (3) of the Probate and Administration of Estate Act [Cap 352 R.E 2002].

ii) That, the Probate and Administration Cause No. 14 of 2023, filed by the petitioner before this Court on the 12th day of July 2023 is incompetent as it contravenes Rule 19 in the Third Schedule of the Local Customary Law (Declaration) Order (1967) as it is accompanied with a fatally defective Will.

iii) That, the Probate and Administration Cause No.14 of 2023 filed by the petitioner before this Court on the 12th day of July 2023 is incompetent as it contravenes Rule 20 in the Third Schedule of the Local Customary Law (Declaration) Order (1967) as it is accompanied with a fatally defective Will.

This matter was disposed off orally, with Dr. Mchami, learned Advocate appearing for the caveator and a Ms. Fadhila Mollel, learned Advocate appearing for the petitioner.

With regard to the first point of preliminary objection, Dr. Mchami submitted brought to the court's attention that section 55 (3) of the Probate and Administration of Estate Act provides that for a Will that is written in any other language than English, there has to be a translation, and be verified by that person. Dr. Mchami further argues that the Will on this application is in Kiswahili, and is headed "wosia wa mwisho". He added that there is no verified translation of the same in the English language attached to the petition of Alphonce Efrem Lyaruu. In his view, the lack of the said translation with verification renders the petition incompetent because the said requirement is mandatorily prescribed by the referred statute. To support his position, he cited the case of **Ahmed Mbaruk and Najma Hassanali Kanji vs Sadik,** Civil Reference No. 20 of 2005, emphasizing that the cited case interpreted the use of the word "shall" that where the same is used, the function so conferred must be performed.

On the second point of preliminary objection, Dr. Mchami submitted that on page 4 paragraph 2 of the Will states that the witnesses are three, and there is no indication that one of them is a blood relative of the testator. Dr. Mchami contended that there is no indication as to who amongst the three witnesses is a blood relative, and therefore the Court will never know who amongst the three witnesses is actually a blood relative. It is Dr. Mchami's contention that since there is no similarity between the names of the witnesses and the giver of the Will, and thus it is no guessing which of the names is a blood relative of the giver of the Will, nor the witnesses who is not a blood relative. His further argument is that since the purported Will was witnessed by an advocate, that person was required to satisfy him/herself that the Will complied with Rule 19 of the Local Customary Law Declaration Order.

Arguing the third point of the preliminary objections, Dr. Mchami submitted that Application No. 14 of 2023 contravenes Rule 20 of the Local Customary Declaration Order, since it is accompanied by a fatally defective Will, referring this Court on page 4 paragraph 1 of the Will. He insists that it presents a thumb and signature on the Will other than what had been said on the declaration and contrary to the

Law. In his opinion this raises doubt on whether it was in fact the deceased who made the said Will, and weather he was in his proper senses, and before a lawyer who should have known what the law prescribes. Based on these objections, he urged the court to dismiss the said petition.

In response to the raised preliminary objections, Ms. Fadhila on the 1st point of preliminary objection, she submitted that the said objection attracts evidence so its not a preliminary objection as a preliminary objection must only be on point of law. To support her argument, she cited the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributor Ltd** (1969) EA 696. Ms. Fadhila further submitted that the deceased person was a Christian, and thus the law applying is the Probate Law, meaning the Local Customary Declaration Order (1967) is inapplicable as the deceased was professing a Christian religion. To support her stance, she cited the cases of **Christian Mwijaku vs Jane Fransisca Alphonce,** Probate Cause No. 163 of 2022 and **Stephen Malyatabu and Another vs Consolata Kihuranga,** Civil Appeal No. 337 of 2020. Ms. Fadhila added that the allegation that witnesses are not related to the deceased does not invalidate the Will, since the deceased is said to

have confessed the Christian religion, his Will is guided under Indian Succession Act, Cap 39 of 1925. She insists that this law does not provide any conditions that the witness must be related to the giver of the Will.

Rejoining, Dr. Mchami reproved his learned friend that since she cited the case that are unreported, she should be required to supply a copy of these cases in Court, arguing that short of which they become mere words from the bar and the court should not consider and give any import to the said cases.

Picking on the specific points responded to, Dr. Mchami contends that the preliminary objections are competent since they are based on law and are on pure points of law. He forcefully added that objections are raised on the basis of the assumption that the pleadings as submitted in court are all correct.

Moreover, he submitted that the argument that the Will was required to be verified in English language is the prescription of the Law, which has been contravened.

Furthermore, Dr. Mchami argues that the argument that deceased was Christian is a new fact, and as a point of fact, it needs to be

proved specifically. That, advocate for the petitioner could only counter the preliminary objection on issue of law, not facts as such need to be proved. It is Dr. Mchami's contention that the issue of customary law, is the Law that prescribes how the Wills should be as there is no other current law for the foregoing on matters related to Wills in the country and the counsel for the petitioner has not cited any law that says otherwise.

Having heard the submissions by both counsel, let start by addressing the 2nd and 3rd points of preliminary objections which basically, attacked the Will itself, stating that the purported Will is defective by contravening Rule 19 and 20 of the third schedule of the Local Customary Law (Declaration) Order (1967).

I must agree with the counsel for the Petitioner that these are not pure points of law to qualify to be Preliminary Objections. This is due to the reason that the very nature of the objection raised needs evidence to ascertain. It is trite law that preliminary objections draw a distinction between the merits of the suit and the subject matter of the objection. An objection should bear the character of matter that can be dealt with without touching the merits, or involving parties in argument of the merits of the case in terms of the evidence. It should

relate to a matter which can be disposed of by the Court without examination of the merits calling for proof of facts. It should therefore be based on pure points of law or on ascertained, undisputed facts and any reasonable inferences that may be drawn from those facts. Objections should be sustained only in cases in which the facts on which they are based are clear and free from doubt. Thus where an objection is inextricably linked to facts that are disputed or have to be proved to ascertain, then it goes to the merits of the suit and it should be joined to the merits. Such points can not be raised and disposed off as preliminary objections.

In my view, on the present petition, the point raised needs ascertaining, by evidence, whether among the witnesses that have signed the Will there is a clan member of the testator. On the other hand, evidence shall also be needed to ascertain whether the testator knew how to read and write so that he could have been required to sign the Will instead of putting his thumb on it. I do not find them qualifying as preliminary objections despite the fact that their validity is being pegged on law. See the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd** [1969] E.A 696.

For the sake of argument and also addressing the other point of preliminary objection, even if this is a pure point of law, as correctly argued by counsel for the petitioner, the Laws governing a Will when the testator is a Christian are The Probate and Administration of Estate Act, Cap 352 R.E 2002, the Probate Rules and the Indian Succession Act, Cap 39 of 1925; certainly not the Local Customary Law (Declaration) (No.4) Order (1967) as pointed by Dr. Mchami. His fronted argument that it is a new fact to say that the deceased was a Christian is misconceived because in item 5 of the petition for probate, it is indicated that the deceased professed Christian religion.

Having said so, these two points of preliminary objections are dismissed for want of merits.

Now I shall turn to look at the 1st point of preliminary objection, that the petition for probate offended section 55 (3) of the Probate and Administration of Estate Act. Subsection (3) requires a translation of the Will into English language where it is written in any other language other than English and the translation shall be annexed to the petition by a person competent to translate the same, and such translation shall be verified by that person.

The foregoing subsection, by the use of the word "shall" has been couched in mandatory terms. In the case of **Godfrey Kimbe vs Peter Ngonyani,** Civil Appeal No. 41 of 2014**,** the Court of Appeal has this to say when the word "shall" is used in a provision:

".....it is elementary that whenever the word "shall" is used in a position, it means that the provision is imperative. This is by virtue of the provisions of section 53 (2) of the Interpretation of Laws Act, Cap 1 of the Revised Edition, 2002. It reads:

Where in a written law the word "shall" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed."

In the view of the above position, therefore, the petitioner ought to have annexed to the petition a translation of the Will in English language as the Will is in Kiswahili language, failure to do so makes the petition incompetent. I find merit on this point of preliminary objection. Having said so this petition is hereby struck out for being incompetent before this Court. This case being a probate matter I make no orders as to costs.

It is so ordered.

DATED at **ARUSHA** this **24th** day of **May 2024**

A. Z. Bade
Judge
24/05/2024

Ruling delivered in the presence of the Parties' representatives in chambers on the **24th** day of **May 2024**

A. Z. BADE
JUDGE
24/05/2024