

TANZANIA / JUDGMENT

PROBATE CAUSE 103 OF 2022 Kinyaha

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TEMEKE SUB-REGISTRY (ONE STOP JUDICIAL CENTRE) AT TEMEKE PROBATE AND ADMINISTRATION CAUSE NO. 103 OF 2022
In the Matter of the Estate of the Late JOAKIM JUSTO KINYAHA.....
DECEASED and In the Matter of an Application for Probate by DOUGLAS JOAKIM KINYAHA.....1st PLAINTIFF/PETITIONER FRIDA JOAKIM KINYAHA..... 2nd PLAINTIFF/ PETITIONER and In the Matter of Caveat Against the Grant of Probate by SOPHIA JOAKIM KINYAHA..... 1st DEFENDANT/ CAVEATOR JENIPHER JOAKIM KINYAHA..... 2nd DEFENDANT/CAVEATOR EVA JOAKIM KINYAHA..... 3rd DEFENDANT/CAVEATOR ADENI JOAKIM KINYAHA..... 4th DEFENDANT/CAVEATOR HARRISON JOAKIM KINYAHA 5th DEFENDANT/CAVEATOR JOYCE JOAKIM KINYAHA..... 6th DEFENDANT/CAVEATOR DANI JOAKIM KINYAHA..... 7th DEFENDANT/CAVEATOR

JUDGMENT

17th May & 28th June, 2024 BARTHY, J.: The petitioners, Douglas Joakim Kinyaha and Frida Joakim Kinyaha, have petitioned for the grant of probate for the estate of the late Joakim Justo Kinyaha, who passed away at Muhimbili National Hospital, Ilala-Dar es Salaam on 1st January 2022. i On 7th November 2023, Sophia Joakim Kinyaha, Jenipher Joakim Kinyaha, Eva Joakim Kinyaha, Adeni Joakim Kinyaha, Harrison Joakim Kinyaha, Joyce Joakim Kinyaha, and Dani Joakim Kinyaha filed a caveat against the grant of probate. In their joint affidavit, they claimed that the deceased was their biological father, was survived by 10 heirs. They asserted that the will left by the deceased was for being executed when the deceased was seriously ill, with a doctored signature, compromised witnesses, and being written under duress. They further contended that the will included properties that did not belong to the deceased and excluded some of his actual properties. The petitioners, in their joint counter affidavit, partly admitted the list of heirs but strongly disputed the rest of the caveators' claims. They argued that the deceased left a valid will, and there was no medical report to support the claim of serious illness. They also disputed the ownership of the properties listed by the caveators. Given the contentious nature of the matter, it transformed into a normal civil suit pursuant to Section 52(b) of the Probate and Administration of Estates Act, Cap 352, R.E 2019 (PAEA). This approach was also stated in the case of Monica Nyamakere Jiqamba v. Muqeta Bwire Bhakome & Another, Civil Application No. 199/1 of 2019, Court of Appeal of Tanzania (Dar es Salaam Registry) [2020] TZCA 1820 (16 October 2020)

(Tanzlii). The issues were framed by court for determination, which were subsequently approved by the parties as follows;

1. Whether the will left behind by the deceased is valid.
 2. If the first issue is answered in the affirmative, whether the probate can be granted to the plaintiffs/ petitioners?
 3. To what reliefs) are the parties entitled? The hearing of this matter was conducted through witness statements filed by the witnesses of each side, who then appeared before the court for cross-examination by the opposing counsel. For the plaintiffs side, the witnesses were led by Mr. Mbaraka Katera, while for the defendant's side, the learned advocate Faudhia Abubakar led the witnesses. The following is a summary of the evidence presented by both sides. PW1: Frida Joakim Justo Kinyaha tendered her statement, which was admitted as Exhibit Pl. In her testimony, she stated that the deceased was her husband, and they were married in 2005 after cohabiting since
1994. She further deposed that the deceased passed away on 1st January 2022 and was survived by 9 children whom she named to be; Douglas, Harrison, Walter, Aden, Jenipher, Joyce, Eva, Sophia, and Winfrida. She 3 ---- mentioned that she had no information about Daniel, as the deceased never mentioned or introduced him, and his full name is Daniel Kisaria, not Daniel Joakim. PW1 testified that before the deceased passed away, in December 2019, he divided his farm at Mwika, Kilimanjaro, among his sons and daughters as specified in the will. She listed the deceased's properties, which included a house at Mabibo Farasi - Ubungo with 9 rooms and 4 business doors at the front and 7 separate rooms, the house at Plot No. 234 at Mabibo Upogolani-Ubungo, Dar es Salaam, a farm at Kibaha - Sangale (already sold), and a farm at Mwika, Moshi (already bequeathed to his children before his passing). PW1 also stated that during their marriage, she operated a hardware business at Ubungo under her name, Frida Ezekiel Nyipeta, with TIN Number 129-777-354. After the deceased's death, before his burial services, she was handed his will by advocate Douglas Mmari. The said will had the signature of the deceased. She further stated that the deceased distributed his property fairly. The Mabibo Farasi house was given to deceased's male heirs, namely Harrison, Walter, and his grandsons, Evance and Fred. The female heirs and the deceased's wife were given Plot No. 234 at Mabibo Upogolani, which she shares with her daughter, Winifrida. The farm at Mwika was 4 already distributed, and the farm at Kibaha Sangale was given to her as she had contributed 50% towards its purchase. PW1 mentioned that the house at Mabibo Upogolani bears her name and that of the deceased. She insisted the house at Mabibo Farasi belonged to the deceased, who obtained it before his divorce from Dorah N. Ngowi. Each part of the building bears a different license: KND/MB019/74 is in the name of the deceased, and KND/MB019/75 is in the name of Dorah N. Ngowi. Frida denied knowledge of any other assets and prayed for the caveat to be dismissed. PW2 Douglas Joakim Kinyaha, tendered and adopted his written witness statement as Exh. P2. He stated the deceased was his father who passed away on 1st January, 2022 and left nine surviving children. He added that Daniel was not the son of the

deceased and his surname is Kisaria. PW2 prayed to be appointed as executor because the deceased appointed him together with PW1 to administer his estate. He further stated that he recognizes the will, having seen it at the clan meeting. He recognized the will as containing the deceased's signature, which was similar to those found on the residential licenses and other properties of the deceased. He identified the properties at Mabibo, Plot No. 234 at Mabibo Upogolani, a farm at Kibaha - Sagale (which had already been sold by the deceased), and a farm at Mwika-Moshi (which had already been distributed by the deceased). A house at Mwika farm was given to Walter before the deceased's demise. PW2 acknowledges the proposed distribution presented in the will and stated that he was allocated a portion of Mwika Farm. However, other children, Evance and Fred, were given two rooms each at the Mabibo Farasi house as they had stayed with the deceased for a long time. He prayed for the caveat to be dismissed. Another witness, PW3 Gladstone Justo Kinyaha, tendered and adopted his witness statement, which was admitted as Exhibit P3. He stated that the deceased was his younger brother and that he recognized the will by the deceased's signature, name, and the names of street leaders Simon Lyimo and Wilfred Lucas. It was stated that in December 2019, the deceased was healthy and strong, as he used to go to pray at Efatha Church by himself. The deceased requested him to witness the will, where he distributed his properties as he wished. He, therefore, prayed for the grant of probate to be issued in accordance to the will of the deceased. Witness PW4, Godlisten Joakim Kinyaha, tendered his written statement and adopted it, which was admitted as Exhibit P4. He stated that he is the younger brother of the deceased and that he witnessed the 6 will, recognizing it by the deceased's name, signature, the names of Gladstone Kinyaha, Street Leader Chairman Simon Lyimo, and Wilfred Lucas, and the date it was executed on 14/12/2019. He further stated that in December 2019, the deceased was not sick; he was rational, and capable of understanding what he was doing. He was asked by the deceased to witness the will written by the deceased, which seemed has fair distribution. The deceased also bequeathed some of his properties to his grandsons because they had taken care of him since they were young. To conclude, he stated that the will is valid as he witnessed the deceased signing it and the signature was made of his own free will. PW5, Wilfred Lucas Monyo, tendered and adopted his witness statement, which was admitted as Exhibit P5. He stated that the deceased was his neighbor and that he was asked by the deceased to be one of the witnesses on his will as a person who was not a relative. He agreed and signed on 14th December 2019. PW5 insisted that the said will is valid, signed before advocate Fadhili Sebuke and the other three witnesses, Simon Lyimo, Godlisten Kinyaha, and Gladstone Kinyaha. PW6 Simon Robert Lyimo tendered and adopted his witness statement, which was admitted as Exhibit P6. He is the neighbor of the deceased. He stated that in the year 2019, he was the street leader, and the deceased came to his office with a written will. He attested that the deceased was of sound mind, and he signed the will as one of the witnesses. The last witness, Douglas Mmari PW7, tendered and adopted his witness statement, admitted as Exhibit P7. He stated that he is an advocate who prepared the will, which the deceased executed on 14th December 2019, while in good health. Another advocate, Fadhili Sebuku, attested to the same. PW8 stated that he was

asked by the deceased to store the will, which was signed by all the witnesses voluntarily. He recognized it, and upon receiving news of the deceased's demise, he presented the will to PW1. That marked the end of the plaintiffs' side. For the defence side, DW1 Joyce Joakim Kinyaha tendered and adopted her witness statement, which was admitted as Exhibit DI. She stated that the deceased was her father, who passed away on 1st January 2022 after being ill since 2010. In 2019, the deceased was seriously ill to the extent of losing his memory and speech, and he was unable to walk. DW1 further stated that she became aware of Frida Nyipeta, who worked as a bar attendant in one of her father's bars, which was under the supervision of Walter Joakim Kinyaha, with whom she had also been living. She also stated that Gladstone and Godlisten convinced the deceased to sell his liquor store to Gladstone to get money for a case with Dora N. Ngowi and to rob him of his liquor shop. DW1 further stated that the deceased had a matter of Matrimonial Case No. 3 of 1993 at the District Court of Kinondoni with her mother, Dora N. Ngowi, where its division of assets led to Land Application No. 243 of 2016, which had ordered that the house at Mabibo Farasi to belong to her mother. This deceased did not appeal against this decision, thus she challenged the validity of the will and sought for it to be rejected. DW2, Sophia Joakim Kinyaha, tendered and adopted her witness statement, which was admitted as Exhibit D2. She stated that the deceased was her father and who fell ill in 2018. By 2019, he was unable to walk and was sometimes he was admitted at the hospital. She further stated that the deceased owned a hardware shop, which PW1 changed the registration name of when the deceased fell ill. She testified that the will should be rejected by the court because it was executed when the deceased was sick, and his signature was forged. She further added that the plaintiffs want to take possession of the deceased's properties and deny the deceased's children their right to inheritance, and that the will includes some properties that did not belong to the deceased. 19 Another witness, DW3 John Mbayo Sadiki, tendered and adopted his witness statement, which was admitted as Exhibit D3. He was the spiritual leader of the deceased from 2019. He met the deceased when he was seriously ill. On 18/12/2021, he was requested by some relatives to ask PW1 to allow the deceased's children to come and visit him, but the efforts failed. DW4, Eva Joakim Kinyaha; DW5, Harrison Joakim Kinyaha; and DW6, Adeni Joakim Kinyaha, tendered and adopted their witness statements, which were admitted as Exhibits D4, D5, and D6, respectively. It was stated in their witness statements that the deceased had 11 children, but it was only 10 children who were alive. The surviving children were named to be Douglas, Jenifer, Harrison, Joyce, Eva, Walter, Sophia, Daniel, Adeni, Winfrida, and Daniel Saria, who was raised in the family of Saria. These witnesses insisted that the will is invalid because it was made when the deceased was seriously ill, and it was presented at the clan meeting in an open envelope. Not all heirs were included or given properties in the will. That marked the end of the defendant's evidence. Having heard the opposing evidence from both sides, this court is now tasked with the duty to determine the framed issues. I will address one issue after another, starting with the first issue: whether the will left behind by the deceased is valid. Before I begin my deliberation, it is prudent to define what a will is. Under section 2(1) of the Probate and Administration of Estate Act, Cap. 352, R.E 2019 (PAEA), a will is defined as follows: " 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." This definition was also referenced in the case of David Samson Shunda and Others vs. Mashimo Kibunqi Ndulu (PC Probate Appeal 6 of 2021) High Court at Mwanza [2021] TanzLII TZHC 3742. (See also the case of Hubert Clemence Mwombeki Kairuki vs. John Balilonda & Another (Probate and Administration Case 4 of 2005) High Court at Dar es salaam [2006] TanzLII TZHC 163. With respect to the issue at hand, the defendants, through their caveat, challenged the validity of the will accompanying the petition for various reasons stated in their affidavit. To understand what constitutes a valid will, in the case of David Samson Shunda & 2 Others v. Mashimo Kibunqi Ndulu (supra) at page 8 the reference was made to the Black's Law Dictionary, 9th Edition, which defines a valid will as; ii "validity" means legally sufficient or binding properly, on the other hand, it means "correctly" or "satisfactory". However, in this matter the will in dispute was never tendered in court as an exhibit for examination. While it was attached to petition and the witness statement of PW1, it was never formally tendered as an exhibit in the case. The non-production of the will contravenes with the requirement made under Order XIII, Rule 7(2) of the Civil Procedure Code, Cap 33 R.E. 2019, which states:

- (2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them. This position of the law was emphasized in the case of Chantal Tito Mziray & Another vs Ritha John Makala & Another (Civil Appeal 59 of 2018) [2020] TZCA 1930, where the court held that: Therefore, though it is not disputed that the will was attached to the caveat in support of the caveat, the trial court wrongly, with respect, relied on it to reach the conclusion concerning the dispute between the parties. 12 In that case, the court further referenced to the case of Abdallah Abas Najim vs, Amin Ahmed Ali [2006] TLR 55, where it was held that: "Annexures to the plaint are not exhibits in evidence; they cannot be relied upon as evidence and cannot be the basis of the decision. As the annexures to the respondent's plaint were not tendered in court as exhibits and were not tested in evidence, it was improper for the learned Regional Magistrate to base his judgment on those annexures." The absence of the will in this contentious probate matter makes it impossible to determine its validity through scrutiny of the law and the evidence presented by the parties. Consequently, it cannot be determined whether the purported will is valid or not, given its absence. Therefore, I find that the caveat entered has no merit and must be dismissed by the court. Given the fact that in the present matter, the petition was for the grant of probate which was made under section 55 of the PAEA and rule 33 of the Probate Rules, in the absence of the will, the court cannot grant probate letters to the petitioner. Consequently, I find the petition for the grant of probate before this court is not proper and I therefore strike it out for being incompetent. It is so ordered. Delivered in the presence of Petitioner in person, Ms. Dai Lazaro learned advocate for the petitioner, Caveator in person, Ms. Faudhia Akbar learned advocate for all Caveators and RMA. Ms. Bernadina Tayari. 14

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