

TANZANIA / JUDGMENT

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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. 216 OF 2022
In the Matter of the Estate of the Late NAVTEJ BAINS..... DECEASED
and In the Matter of Application for Grant of Probate Letters by APURVA
BAINS..... 1 PETITIONERS L TEJ
BAINS..... ' and In the Matter of Caveat by ESME
BAINS..... CAVEATOR

JUDGMENT

18th October & 18th November, 2024 BARTHY, J.: The petitioners, Apurva Bains and Tej Bains, petitioned this court for a grant of probate for the estate of the late Navtej Bains, who died on 14th October 2022, leaving behind a Will purportedly executed by the deceased on 26th November 2021. The petition was contested by Esme Bains (the caveator), who raised several objections. She argued that the purported Will was invalid for multiple reasons. First, she claimed it contained a forged signature and was witnessed without the presence of any relatives as testators. Furthermore, she contended that at the time of signing, the deceased was not of sound mind due to a hemiplegic stroke he suffered, which affected his brain and impaired his ability to make rational decisions. Stating, since 2014, the deceased had suffered from severe aphasia, rendering him incapable of writing or speaking. The caveator also contested the Will on the grounds that the deceased unjustly disinherited her, despite her status as his first daughter and rightful heir, without providing any justifiable reason and her inclusion was not fair. She further challenged the claim that the estate's distribution followed Sikh customs, arguing that this was inconsistent with Sikh religious principles. Additionally, she pointed out that the Will has failed to include some of the deceased's movable and immovable assets, both within Tanzania and abroad, raising doubts about its genuineness and validity. Following the filing of a caveat, the matter proceeded as an ordinary suit, with the petitioners becoming the plaintiffs and the caveator as the defendant. The issues for determination, as agreed by the parties and the court, are;

1. Whether the deceased left a valid Will. 2

2. To what reliefs are the parties entitled to. At the hearing of the matter, both parties were duly represented. For the petitioners, now the plaintiffs, appeared the learned advocates Mr. Seni Malimi, assisted by Ms. Edna Mwankenja and Mr. Jovinson Kagilwa. For the caveator, now the defendant, the learned advocate Mr. Laurent Leonard appeared. During the hearing for the plaintiffs' side, seven witnesses presented various testimonies. PW1 - Nzaro Nuhu Kachenje (Advocate) who testified as PW1 had represented the deceased since 2017, drafted his Will in 2021, and managed several legal and business transactions for him. The Will left the estate to the deceased's son, Tej Bains, with provisions for the wife and daughter, consistent with Sikh traditions. He confirmed the Will was signed by two witnesses (also testifying as PW2 and PW3) and refuted claims of the deceased's unsound mind by presenting evidence of complex business agreements executed by him. Several documents, including the document for possession of firearm, lease agreements, a Memorandum of Understanding, acquiring new business 3 licence, and a Will from India (Exhibits P16, P8, PIO, P12, P13, P15, P19, P20, and P21), were admitted to show the deceased's mental competence. PW2 - Frank John Mhina (Assistant Estate Manager): He had worked with Bains' family since 2010 and witnessed the signing of the Will in November 2021, confirming that the deceased, despite suffering from stroke in 2014, was mentally sound. He recognized the signatures on the Will (Exhibit P3). Marlyn Kitale (Advocate): As PW3, she witnessed the Will's signing, she confirmed her signature as the second witness on Exhibit P3. She did not read the Will's contents but recognized the deceased's signature and confirmed the authenticity of the document. Another witness PW4 - Aneth Wangeci Kirethi (Advocate): She testified about the safekeeping of deceased's Will. In November 2021, late Mr. Bains entrusted her office with the Will, which was stored without being opened. She later arranged for the will's release after his death, confirming the letter of release (Exhibit P24) during her testimony. PW5 - Michael Joachim Tumaini Ngalo (Advocate): testifying virtually was another custodian of the Will and testified about the Will's storage which he was handed over by Mr. Bains and from fellow advocate Nzaro Kachenje 4 in November 2021 and kept it in a safe without opening it. Following his death in October 2022, PW5 chaired the Will-reading meeting, which proceeded smoothly, and signed the minutes. He mentioned the deceased's communication difficulties after a stroke but did not believe it affected his mental state. He confirmed that the late Mr. Bains communicated clearly through gestures and that he was unaware of his prior stroke. PW6, Apurva Bains, wife of the deceased, testified about the probate of her late husband's Will, first seen at the reading on 24/10/2022. The Will named her and their son Tej as executors, with Tej as the primary beneficiary. Apurva expressed shock at the deceased daughter Esme Bains' (DW1) subsequent application to remove her and Tej as executors. PW6 countered DW1's claim of mental incapacity by presenting exhibits demonstrating Mr. Bains' continued business activities after his stroke. Exhibits supporting PW6's claim included a photograph of Mr. Bains with the Kuwaiti Ambassador (admitted as Exhibit P24), and several documents illustrating his mental competency, such as a WhatsApp chat from a poker tournament (Exhibit P29), vehicle registration cards (Exhibit P30), a proforma invoice for a new Toyota Land Cruiser (Exhibit P31), eight flight itineraries (Exhibit P32)z and Mr. Bains' passport (Exhibit P33). A photo of

Bains holding his Indian will, admitted as Exhibit P34, and WhatsApp chats with Esme, which reflected a positive relationship, were admitted as Exhibit P35. Tej Bains, PW7 testifying virtually, confirmed the validity of his father's Will, stating that it followed Sikh customs. He dismissed Esme's claim of their father's mental incapacity, asserting that his father remained mentally sharp post-stroke. PW7 requested the court to grant probate and dismiss DW1's objection. On the side of the defendant, total of four witnesses testified. DW1, Esme Bains, testifying virtually contested the validity of her father Navtej Bains' Will. She also cited the strained relationship with the petitioners after the death of her father and questioning the authenticity of the deceased's signature due to his health complications after a stroke in 2014. She presented a burial permit as Exhibit DI and an email from Advocate Kachenje as Exhibit D2, presenting her father's efforts to include her in his estate. She claimed the Will did not reflect Sikh values of gender equality and doubted the legitimacy of certain signatures. The court admitted her father's passport as Exhibit D3 and a search tracing report on her father's properties as Exhibit D4. 6 DW1 also described strained relations with her stepmother (PW6) and alleged that she transferred assets into her own name after the death of her father. DW1 stated the purported Will effectively disinherited her, and she claimed her father was of unsound mind when signing it. During cross-examination, DW1 acknowledged her absence from Tanzania for most of her father's illness and detailed gaps in their communication which was tendered by PW6 as the exhibits. Although she emphasized, they remained in contact with her father throughout. DW2, Jagdish Singh Kier, identified himself to be the Sikh leader and he testified about Sikh inheritance customs, emphasizing equality between sons and daughters; while DW3, Nadeem Sheikh, a consultant physician, testified about Navtej's stroke and its effects on his speech and mobility. Although he confirmed Navtej's partial recovery by 2016, and afterwards he did not see him again. This marked the defendant's side testimony. Having heard the testimony from both sides, noteworthy, on behalf of the parties, their counsels lodged detailed written final submissions in support of their respective positions with regard to the petition for grant of probate filed before this court. 7 On the final submission made on behalf of the petitioners as prepared by Mr. Seni Malimi and Mr. Johnson Kagirwa learned advocates; they submitted that, in this matter, the petitioners seek validation of a Will attributed to Navtej Bains, who passed on 14th October 2022, naming them joint executors. The caveator contests the Will's authenticity, alleging the deceased was of unsound mind, the signature was forged, the witnesses were non-relatives, and the Will disinherits her. It was their submission that, in this matter main issues to be addressed by this court are (i) the validity of the Will which was discussed in four components and (ii) the reliefs to which parties are entitled. In determining whether the will is valid, the counsels considered section 2(1) of the Probate and Administration of Estates Act and supported by the case of Joyce Raphael Bisaya vs. Eliya Raphael Bisava and Another, Civil Case No. 2/2020, High Court, Tabora at page 8 (unreported), a Will expresses a testator's property intentions posthumously. Attesting that the will is valid, they referred to Allen Rutatekururwa Rugazia vs. Perfectos Ruteganya, Civil Appeal no. 530 of 2022, Court of Appeal, at page 18, the Court outlined factors to determine validity, including proper execution, testator capacity, absence

of undue influence, and forgery. It was further argued the Will met all execution requirements, supported by witness testimony (PW2, PW3), evidencing the testator's signature. The caveator's forgery claims lacked specific proof or expert verification, a failure highlighted under *Twazihirwa Abraham Mgema Versus James Christian Basil* (As Administrator of the Estate of the Late and in *Antony Amin Haji vs. Yasmine Haji*, Probate and Administration Cause No. 33 Of 2021, high court at Temeke. The learned counsels insisted that, the petitioners presented documentation showing the deceased's continued business activities post- stroke. They cited *Antony Amin Haji vs. Yasmine Haji* and *Hemedi Said vs. Mohamed Mbilu* to affirm that caveator's lack of proof regarding unsound mind, as no medical expert testified on incapacity in 2021, left the Will valid. In addition to that, they stated there are facts that were not pleaded or proven by the caveator; hence, the Will passes this test. It was their submission that since the deceased was Sikh, distribution followed the Hindu Succession Act, 1956, incorporated into Tanzanian law under the Indian Succession (Non-Christian Asiatic) Act. Citing the case of *Govindbhai Chhotabhai Patel vs. Patel Ramanbhai Mathurbhai* 9 established that the testator's property disposition rights supersede claims by descendants. It was further argued that the Caveator's claim of disinheritance is unfounded since the deceased's Will explicitly names the Caveator as a beneficiary, ensuring her unrestricted access to resources to meet her needs. The Caveator's dissatisfaction with the form of benefits does not warrant invalidating the Will. The learned counsel emphasized that a testator has full discretion over the distribution of their property and is not required to allocate assets equitably. Additionally, the Will provides specific reasons for bequeathing the estate to the petitioner's son, recognizing his involvement in the deceased's business and assets. It was therefore their prayer the caveat be dismissed, the Will be confirmed, and the appointing the executors as named in the Will. In closing arguments, Mr. Leonard on behalf of the caveator, he challenged the validity of the late Navtej Bains' Will, dated 26th November 2021, which bequeaths the entire estate to his son, with instructions to care for his sister. He was firm the Will disinherits the caveator who is the daughter without justification. Hence, seeking the grant of letters of administration to herself on grounds that the Will is invalid. Ml 10 He advanced the reasons for consideration of the Will being invalid to be the deceased's medical condition following a 2014 stroke, which led to aphasia; that impaired his ability to communicate or move, questioning his mental capacity to make a valid Will. He further asserted that the witnesses confirmed that the deceased struggled with speech and writing due to his condition. Also, there was no medical report which was provided to prove his recovery. Citing the case of *Mark Alexander Gaetje and Others vs. Brigitte Gaetje Defloor*, Civil Revision No. 03 of 2011, the Court of Appeal of Tanzania at page 7 and *Ramnik Vaghela vs. Mahendra Vaghela* [2000] TLR 223, at page 227, the Caveator emphasizes that a Will's validity depends on the testator's capacity and circumstances of execution. Also, Mr. Leonard raised the concerns of discrimination. Stating under Sikh customs both sons and daughters are equally entitled to inherit, supported by case of *Joyce Raphael Bisaya vs. Eliya Raphael Bisaya* and *Straton Patrice Ndakidemi vs. Margareth Albert Ndakidemi*, Civil Case No. 2 of 2020 (Unreported), which underscore that heirs cannot be disinherited without reason. n He also highlighted the

concerns over the authenticity of the Will, pointing out inconsistencies in signatures. Referred to section 75 of the Evidence Act, Cap 6 R.E 2022, over the contradictions in testimonies about the Will's custody and reading. It was the prayer of Mr. Leonard to this court to declare the Will invalid, asserting that its contents, possibly altered, show intent to disinherit her without reasonable cause. As such, the caveator seeks dismissal of the petitioners' application for probate. Also, this court to find in her favor, granting her administration rights. After reviewing the submissions and evidence presented by both sides, the court must address the issues raised in this matter. I will begin with the first issue, which concerns the Will purportedly to be executed by the deceased, Navtej Bains. The main issues for determination revolve around the validity of the Will, which hinges on two key questions: Whether the deceased had the legal capacity to execute the Will; and whether the Will was properly executed in accordance with the law. This was articulated in *Mark Alexander Gaetje and Others vs. Brigitte Gaetje Defloor* (cited supra).¹² The petitioners seek confirmation as executors of the deceased's Will, which was tendered through PW1 and admitted as Exhibit P3. They assert that the Will is valid and complied with all legal requirements. Conversely, the caveator contests its validity, alleging that it was improperly executed and potentially forged. In Tanzania, the law of succession reflects the country's pluralistic society, applying Customary Law, Islamic Law, or statutory law depending on the deceased's tribe, religion, or lifestyle. In this case, the deceased, being of Indian origin and of the Sikh religion, his estate is governed by statutory law as provided under the Indian Succession Act, 1865. (the Indian Succession Act). Section 30 of the Hindu Succession Act, 1956 (applicable under the Judicature And Application of Laws Act, Cap 358) permits any Hindu to dispose of their property through a Will, provided that the testator is over 18 years, of sound mind and meets the requirements under Sections 46 and 50 of the Indian Succession Act. On the question of legal capacity of the deceased, the evidence from both sides revealed that the deceased suffered a stroke in 2014, resulting in 13 aphasia, which impaired his ability to speak and write fully. However, testimony from PW1, PW2, PW6, and PW7 demonstrated that, despite his limitations, the deceased retained sufficient cognitive and functional capacity. The evidence further reveal that the deceased resumed activities such as executing his legal agreements, driving, traveling, and conducting his daily businesses. These activities were corroborated by multiple exhibits, including: Exhibit P9 (lease agreements), PIO, P12 (business registration documents), P14 (firearm registration), P28 (driving license), and P33 (passport). On the contrary, the caveator (DW1) alleged that the deceased's stroke rendered him incapable of meaningful communication, citing an online article about aphasia as supporting evidence. However, the court observes that the said article was not formally tendered as evidence during the proceedings, nor does it constitute a medical report specifically on mental condition of the deceased. Consequently, the article holds no probative value in this case, as it fails to meet the evidentiary standards required to substantiate the caveator's claims regarding the deceased's alleged incapacity. DW1 stated on his testimony that she received an email, marked as Exhibit D2, from PW1's office, which contained instructions from her late 14 father directing that she be allocated shares in his company. This acknowledgment demonstrates the deceased's efforts to provide

for DW1 and reaffirming his intention to ensure her financial welfare. This suggests that DW1 trusted her father (the deceased) to make decisions in her best interest, as evidenced by her acceptance of the instructions conveyed through the email. However, in a contradictory stance, DW1 simultaneously questioned her father's mental capacity to execute the Will. This inconsistency raises doubts about the credibility of her claims. Additionally, DW3 (a medical expert) testified that the deceased experienced partial recovery by 2016 and retained sufficient cognitive ability implying he was able to make rational decisions. The law places the burden of proof on the party asserting the affirmation of the facts, as provided under section 112 of the Evidence Act, Cap. 6 R.E. 2019, as also emphasized in *Zubeda Ahmed Lakha vs. Hajibhai Kara Ibrahim & Others* (Civil Appeal No. 238 of 2018 Court of Appeal at Tabora [2022] TZCA 310 (25 May 2022)). In this matter, the petitioners' side have provided credible evidence through witnesses who attested to the deceased's mental and physical capacity to execute the Will, despite his stroke. Their testimonies established 15 that the deceased was fully aware of his actions and voluntarily affixed his signature to the Will in the presence of witnesses. Based on the evidence, the court finds that the deceased possessed the requisite mental capacity to execute the Will. The allegations of incapacity, therefore, lack merit. In addressing as to whether the Will was properly executed, Under Section 50 of the Indian Succession Act, the testator must follow these requirements when executing a will:

1. The testator must sign or affix their mark on the will, or someone must sign on their behalf in their presence and at their direction.
2. The signature or mark must clearly indicate the intent to give effect to the document as a will.
3. The will must be attested by two or more witnesses, each of whom must have seen the testator sign or affix their mark, or someone else sign at the testator's direction, and each witness must sign in the testator's presence. [The emphasis is supplied]. 16 In reviewing Exhibit P3 the Will was signed by the deceased, witnessed by two individuals (PW1 and PW2), and contains an attestation clause. PW1 and PW2 testified that they witnessed the deceased sign the Will. The caveator alleged that the deceased's signature was forged, citing discrepancies in his signatures. There was also a claim that the purported Will did not contain the genuine signature of the deceased or that it contained forged signatures. The petitioners, through PW1, PW2, PW3, PW4, and PW5, provided a detailed account of the deceased's ability to sign using his left hand. Furthermore, PW1, PW2, and PW3 stated that they witnessed the deceased attest to his signature on each page of the Will. The court observed there were minor variations in the deceased's signature, such as those in Exh. D2 and Exh. P33 (the earlier and later passports), particularly on documents signed after his stroke, could be reasonably attributed to the physical effects of the stroke. Moreover, with regard to the issuance of the passport the signatures must be verified by immigration officials at the time of signing, as the individual personally signs in their presence, thereby eliminating the possibility of forgery. 17 The caveator raised arguments alleging that certain

relatives from Nairobi had confided in her about a purported plan to forge the deceased's Will. While such an accusation is grave and would have significant implications for the validity of the Will, the court observes that none of these alleged informants were called to testify under oath. Their absence from the proceedings denied the court an opportunity to evaluate the credibility of their claims or subject their statements to cross-examination. For an allegation as serious as forgery, compelling and direct evidence is required to support the claim. In this case, the caveator relied solely on hearsay, which lacks the probative value necessary to influence the court's determination. Without the testimony of these individuals or corroborating evidence to substantiate the caveator's assertions, the claim of a conspiracy to forge the Will remains speculative and unsubstantiated. In cases of alleged forgery, the burden of proof lies squarely with the party making the accusation. It is not enough to merely assert forgery; the claimant must provide clear, credible, and convincing evidence that the signature was not made by the testator. The standard of proof for such allegations is elevated, requiring a higher degree of probability compared to ordinary civil claims. This principle was emphasized in *Pauline Samson 18 Ndawavya vs. Theresia Thomas Madaha*, Civil Appeal No. 45 of 2017, Court of Appeal at Mwanza. In that case, the court underscored that allegations of forgery must be proven to meet the threshold of a higher scale of the preponderance of probability. The caveator's argument that the absence of a relative as a witness to the Will amounts to an act of collusion is not supported by the law. Witnesses to a Will are primarily required to attest to the fact that the testator executed the document voluntarily and in their presence. The role of witnesses is not to provide validation based on familial or communal ties but to ensure the authenticity and compliance of the Will with statutory requirements. Hence, the absence of relatives as witnesses does not invalidate the Will or suggest any form of collusion. Therefore, the legal requirements under Section 46(2) and Illustration

- (c) of the Indian Succession Act are satisfied, as there is compelling evidence demonstrating that the testator signed the Will, which was duly attested by two witnesses in accordance with the law. Additionally, the evidence clearly establishes that the custody of the Will was entrusted to two different individuals, PW4 and PW5. Their testimonies confirm that the Will remained intact and free from tampering until the day it was read. —'1' . 19 This unbroken chain of custody further reinforces the authenticity and validity of the Will. The testator's compliance with procedural safeguards, the untainted custody of the Will, and the impartiality of the witnesses collectively confirm the legitimacy of the document and its provisions. The caveator has failed to present compelling evidence to substantiate the allegation that the deceased's signature on the purported Will was forged or otherwise inauthentic. The caveator has also raised concerns regarding the distribution of the estate and her claim of disinheritance. Clause 7 of the deceased's Will explicitly outlines the distribution of his assets, adhering to Sikh religion and customs. While the caveator argued that she was disinherited, the Will expressly provide for her needs through her brother, PW7, who is tasked with ensuring her welfare. The deceased justified this distribution by highlighting PW7's significant role in managing his businesses and assets. Under section 46

of the Indian Succession Act, the testator has the discretion to distribute his estate as he deems appropriate, reflecting his wishes and intentions. This legal provision recognizes the testator's autonomy in determining the allocation of his assets, provided it does not contravene established principles. 20 The testator's discretionary power to distribute their estate is not absolute but limited by law. While the testator has freedom in deciding in distributing his estate. It is now the established principle that if he chooses to disinherit an heir, he must provide reasons for doing so. See *Joyce Raphael Bisaya vs. Aliya Raphael Bisaya* (cited supra). According to Exhibit P3, the deceased distributed all his assets under Clauses 7.1, 7.2, 7.3, and 7.4 of the Will to his son (PW7). The justification provided for this decision was that PW7 had played an instrumental role in managing the deceased's assets, businesses, and overall interests during his lifetime. Notably, although DW1 and PW6 were not directly named as beneficiaries of any those properties in the Will, the testator imposed a clear condition on PW7: He is obligated to provide for all the needs of DW1 and PW6 without any restrictions for the remainder of their lives. This arrangement ensures that DW1 and PW6, despite not being direct recipients of assets, are adequately cared for through deceased resources. This distribution aligns with the provisions of Section 97 of the Indian Succession Act, which allows for bequests to be made to one person for the benefit of another. In this case, while the assets are bequeathed to PW7, the testator's instructions guarantee lifetime support for DW1 and PW6, fulfilling the legal principle that beneficiaries' needs must be met equitably, even if indirectly. In the case of *Allen Rutatekururwa Rugazia vs. Parfectus Ruteganya* (cited supra), the court emphasized that: "...A court can only interfere with the wishes of a deceased person expressed in his Will with respect to distribution of his estate in exceptional situations, such as where the Will fails to provide for a dependant of the deceased either totally or adequately. "[Emphasis is supplied]. In this matter, the testator chose to provide for the needs of certain heirs mentioned in the Will through alternative means, ensuring their welfare for their lifetime. The caveator's claim of being disinherited by the Will is therefore unfounded and lacks merit. The caveator also alleged that the petitioners excluded certain properties during the filing of the petition. However, the court emphasizes that probate proceedings are primarily concerned with the validation of the Will and not the administration of the properties. Any undisclosed properties may be addressed separately through a petition for letters of administration. Regarding the allegation of premature disposal of properties, the caveator contended that the petitioners had unlawfully disposed of assets belonging to the estate before being formally appointed as executors of the Will. Such actions, if proven, would constitute a serious breach of fiduciary duties. However, in the present case, the caveator failed to provide credible or concrete evidence to support this claim. No documentation, witness testimony, or other forms of reliable proof were tendered to demonstrate that the petitioners engaged in any premature transactions involving the estate's assets. The document tendered before this court, being the land official search report (Exhibit D4), did not provide any proof of the sale of the property as alleged. In the absence of such evidence, the claim remains unsubstantiated and cannot be upheld. The court, therefore, finds that the allegation lacks merit. 23 Based on the foregoing, the court finds that the deceased had

the capacity to execute the Will as required by law. Also, the Will was properly executed and meets all statutory requirements. Accordingly, the caveat is dismissed for being devoid of merit. The petitioners are confirmed as executrix and executor of the deceased's Will, and a grant of probate is issued. They are further ordered to ensure that the needs of all beneficiaries, including those not explicitly bequeathed with the estate in the Will, are adequately addressed when filing the inventory and accounts of the estate. Considering the nature of the relationship between the parties in this matter, each party shall bear their own costs. It is so ordered. Dated at Temeke this 18th November, 2024 G.N. BARTHY X 4 JUDGE Delivered in the presence of petitioner in person, Mr. Dennis Maganga learned advocate for the petition, Mr. Laurent Leonard learned advocate for the caveator and Ms. Bernadina Tayari, RMA. 24

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