

DECIDED
19 July 2016

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i. FLORENCE GATI NDEGE - _ :_ . {.;.....< ~. (As guardian of BAZIL SAFARI NDEGE) 2ND PLAINTIFF ,

3. FLORENCI~ GATI NDEGE {As guardian of ... t , .. ; ... ', _ ,, , _ . :'; : . ~:: ; ~ '. , AUGUS, ~INE ND{G"E)' ~, ~ .. ~~, ~~~ :-~. 3RD PLAINTIFF :t. '

4. f'LORENCE GATI NDEGE •• r,:.'• I \:_~::~:'!.<.:''' , ~);: ;I• (As guardian ot BLAZf;J'+,11WITA NDEGE) 4TH PLAINTIFF !;;;_ :_ .; : , . . - •. VERSUS . -1. STRATON AMANI MANG'ONDI NDEGE ---- ----- -- lsr DEFENDANT; < , -, :.'" ; 2.. SEBASTIAN SIASA N~EGE ~ :. 2ND DEFENDANT, C':"":_,.,;,. J. AN'D)R·EW NDEGE " ■ :a ■ 1 1 ■ 11 ■ 11 ■ aw111,'11 ■■■■····~ ■■ 11 ■ ~1111111····r1a11 3·RD DEFENDANT · .. ,,,;r , , ,--- ' , ' . I~:::<, ~_!, •.. , .~ \ :.:

4. :JUS1'INE M.AGIGE NDEGE ~ .. : ~ .. 4TH DEFENDANT!'·._<:"·Jr,:;> Date of Last Order: Date of Judgment: 23/06/2016 19/07/2016 ~00 ~- f ~: . JUDGMENT ON ADMIS~ION C/~ _FE_LESHIJ;: ~&)/r,,. t ... CJ . . The plaintiffs sue the defendants in this Court for an order dir&tng · sale of a house and immovable property in Plot·No. 16 Block 31H situate. in Kinondoni. District registered under Certificate of Title of Title No. 41754,, an order directing proceeds of sale of the suit property to be_ distributed· . . equally to each and every tenah't in common and costs of the suit. On their ·part, the defendants prayed for the suit to be dismissed . . Moreover, -. they preferred a Counter Claim ' - praying for declaration . that the · . _1st plaintiff in Probate an~ Administratio·n Cause No. 42 of 2001 in the High· - Page 1 of 6 Court· mismanaged and· or misappropriated·- the assets -of the deceased's estate. Likewise, they prayed for . an order compelling the 1st plaintiff to . exhibit a correct inventory ! . . . and :. account ! for the deceased's .estate: ~'. . . . - Besides, the defehdahts ·prays. for detlaration that the trans~er of CT . No. 41754 into the name of th~ 1st plaintiff and subsequent tr~nsfer ·into the names of the plaintiffs· ·and the ·defendants · W_QS fraudulent and purported one, consequently, ineffectual,. null· and voidi Likewise, the defendants prayed for an order compelling the -1st plaintiff to return· all the· · · assets and proceeds to . the·· estate of · the deceased which she. · · misappropriated for

For benefit and the other plaintiffs. ,. . . . Moreover, . they pray for general damages, ' . . -
 declaration that the family - ~ house on the suit land is not liable for sale, division
 or po_rtionin_g .. Furthermore, they pressed for costs of the suit. ',) ,_ On 17/06/2016,
 learned counsels for both sides filed their . agreed. . issues as follows;- ' . ' ::.

- 1) Whether the registration of transfer of ownership of the suit property to both the plaintiffs and the defendants as tenants in common in equal shares was done fraudulently?
- 2) Whether the plaintiffs had been denied by the defendants or any of them the right of use and occupation of the suit property?
- 3) Whether the defendants are using the suit property for their own benefits excluding the plaintiffs? ;
- 4) Whether the defendants are required to pay rent to their own share in the suit property? .5) What relief are parties entitled to? , When the matter was set for settlement of issues and commencement of hearing on 21/6/2016, both counsels intimated the Page 2 of 6 intent by the parties to amicably settle the matter the intimation which resulted into an adjournment to allow the parties to explore that settlement avenue. Whilst alive to the provisions of Order VII B Rule 3 (1) of the Civil Procedure Code, [CAP. 33 R.E, 2002] that requires a trial Judge or Magistrate to give a last chance to parties to explore non trial avenues that they may settle the civil dispute amicably, this Court adjourned the matter to the 23/06/2016 and invoke Order X, XI, XII and XIV of the Civil Procedure Code (supra) to guide the subsequent adjudicative processes should it be necessary, amicable settlement not being attained by 23/6/2016. Notably, the said parties intended amicable settlement was not attained. Having examined the pleadings thoroughly, this Court found to be necessary to approach the matter in terms of Order Rule 1, XI Rule 12 and XIV Rule 4 of the Civil Procedure Code (supra) of which the WILL of the late Casmir Bigode was admitted in evidence as Exhibit "Pl". In Acting on Exhibit "Pl" and considering the five framed issues proposed by the learned counsels and having paid regard to the pleadings, the Court found it expedient to invoke Order X Rule 1 of the Civil Procedure Code, to determine the following issues:
 - Whether the registration of transfer of ownership of the suit property to both the plaintiffs and the defendants as tenants in common in equal shares was done fraudulently?
 - Whether the plaintiffs had been denied by the defendants or any of them the right of use and occupation of the suit property?
 - Whether the defendants are using the suit property for their own benefits excluding the plaintiffs?
 - Whether the defendants are required to pay rent to their own share in the suit property?
 - What relief are parties entitled to?
- 5) Whether item X of the WILL (Exhibit Pl) which reads--- "Warithi wangu, wote kyva p9_r.noja ninawarithisha nyumba iliyoipo kwenye kiwanja naml, j~\$ Kit~1Y~1F KJnondoni Jijini Dar es Salaam": has been varied or vacated, and

- 2) Whether the house on plot No. 16 Block 31F Ki_nondoni Dar es Salaam. is now occupied by other persons other than the heirs of the late Casmir Bigacho Ndege. Page 3 of 6 r . In response to the re-framed issues by this Court, Blaze Mwita Ndege stated as to the first issue that, item X of the WILL (Exhibit Pl) has not changed. As to the 2nd issue, he stated that, it is only Andrew Ndege and Justine Magige Ndege (3rd & 4th defendants) who are presently living in the house situated at Plot No. 16 Block 31F Kinondoni Dar es Salaam. The 1st & 2nd defendants have their own residences whereas he (Blaze Mwita Ndege) and Augustine Ndege are presently living in a leased house. On his part, Augustine Ndege subscribed to the position presented by Blaze Mwita Ndege whereas Justine Magige Ndege also stated as to the 1st issue that item X of the WILL has not been varied. As regards the 2nd issue, Justine Magige Ndege stated that the house on plot No. 16 Block 31F Kinondoni Dar es Salaam is presently occupied by him and Andrew Ndege who are both heirs of the late Casmir Bigacho Ndege. That position was shared by Andrew Ndege and Straton Aman Mang'ondi Ndege. On his part, in view of the position presented during the Court's examination, Mr. Dennis Michael Msafiri, advocate for the plaintiffs prayed this Court to guarantee his client's rights falling in the property in question. Besides, he pointed out that they earlier intimated to him of their willingness to sell their respective shares in the property to the defendants being among the best ways for them to benefit from the property. On the other hand, Mr. Michael Ngalo advocate of Ngalo & Company Advocates for the defendants submitted that, it appears to him that the WILL (Exhibit Pl) is still intact and no one has denied the plaintiffs' right to use the house on Plot No. 16 Block 31F Kinondoni Dar es Salaam. Page 4 of 6 : Under the circumstance where living in harmony is prime to both sides, Mr. Ngalo urged the court to rely on the pleadings and the responses to the examination conducted to issues and make equitable order.
- Orders under Order XII of the Civil Procedure Code (supra) that: "... Any party may at any stage of a suit, where admissions of fact have been made either on the pleading, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties, and the court may upon such application made such order; or, give such judgment, as the court may think fit. From both the pleadings and the respective admissions, since Judgment ... and Order of the High Court in Probate and Administration of Cause No. 2 of 2001 are in existence and considering that the house in dispute forms part in the "WILL" of the deceased subject for execution, that is, its execution and filing of inventory as prescribed by law, the same has to be subjected to the said execution with ultimate filing of an inventory. Besides, considering that item X of the WILL (Exhibit Pl) which reads: "Warithi Vltangu wote kwa pamoja ninawarithisha nyumba: iliyo kwenye kheri, uli namba 16 Kitalu 31F Kinondoni Jijini Dar es Salaam" has been admitted to be still in force, it is my considered view, that parties should stick to the said "WILL" unless otherwise agreed by their consent. It is thus clear to me that, the way the parties framed, filed and

pleaded their claims renders the reliefs sought misconceived. This is because, both parties paid no regard to at all to other appropriate avenues : seized with jurisdiction to entertain the complaints raised in relation to the Page 5 of 6 . . . administration of the deceased estate. Entertaining those prayers therefore is tantamount to abusing the court process. I therefore, allow only prayer (iv) of the plaint, and prayers (i) and (k) of the Counter Claim. The rest prayers are hereby dismissed. . . . In view of . . . the admissions made by the parties above, both the plaintiffs and the . . . defendg_n1:S are hereby declared to responsibility over the prope , ----:----:----- have . equal . . . rPlot-N~l6t3lock 31H situated in right, share and Kinondoni District registered under Certificate of Title of Title No. 41754. In addition, this Coult holds that, by virtue of item x ,of the WILL of the late Casmir Bigacho Ndege the aforesaid family house Js not liable for sale or division or partiti~ning. Sh?uld the lawful heirs in the deceased's estate, wish to dispose it by sale or etse,:' then the"y should do so- by their unfettered consent. The suit and Counter Claim are therefore allowed to the extent explained above. Considering that the parties have equal right, share and, responsibility over the property and the cir~umstances of the case, I ~efrain from awarding costs. It is so ordered. absence of the parties. Right of appeal is explained. c::: . .-- J.S.K~ AASSAN ~ -;7""--,-,-- ,....

AG. DEPUTY REGISTRAR . Page 6 of 6

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