

TANZANIA / JUDGMENT

azizi kassim ulaya vs muhibu jabiri

2024 tzhc 922 26 january 2024

COURT
TZHCDECIDED
26 January 2024

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THE UNITED REPUBLIC OF TANZANIA IN THE HIGH COURT OF TANZANIA (MTWARA DISTRICT REGISTRY) AT MTWARA DC CIVIL APPEAL NO. 5 OF 2022 (Originating from Civil Revision No. 4/2022 of Masasi District Court, originating from Probate & Administration Cause No. 31/2022 from Lisekese Primary Court) AZIZI KASSIM ULAYAAppellant
Versus Muhibu JdbiriRespondent

JUDGEMENT

Date of Last order: 05.10.2023 Date of Judgement: 26.01.2024 Ebrahim, J.: This case originates from the Primary Court where the Respondent herein successfully petitioned to be appointed the administrator of the estate of the late Kassimu Ulaya Mnavadume who died on 30th October, 2021. As the records of the trial court would show, on 21.04.2022, the court issued a citation and when the matter was called for hearing on 02.05.2022, it was recorded that there was no person who registered or had any objection to the petition. Page 1 of 10 At the hearing, the Respondent produced a Will and an affidavit in showing that the: executor appointed in the Will is an old person with health challenges hence his replacement. The trial probate court considered the petition and acknowledged the Will and appointed the Respondent to be the executor of the estate of the late Kassimu Ulayo Mnavadume. The Appellant was dissatisfied by the decision of the trial court. He thus lodged an application for revision at the District Court of Masasi at Masasi praying for the court to look at the correctness, legality and propriety of the proceedings on the appointment of the Respondent as the executor of the Will and the validity of the said Will. The District Court considered the submissions made by both parties and the structure and contents of the Will and was satisfied that the Will was legitimate and proceeded to dismiss the revision. Aggrieved again, the appellant preferred an appeal in this court raising four (4) grounds of appeal mainly challenging the Will that it was not executed according to the deceased wishes since if was someone else who executed the Will; the Will was fraudulently made; that the Will was under the custody of the deceased's wife contrary Page 2 of 10 to the law; and that the Will infringed the appellant and other children from their father's inheritance. This case proceeded exparte by the order of the court of 15.08.2023 following the none appearance of the Respondent despite being served via substituted service in Mwananchi Newspaper of 21.07.2023. This appeal was disposed of by way of written submission as per the schedule set by the court. Submitting on

the 1st ground of appeal in respect of the ruling of the District court on the issue of jurisdiction, the appellant cited the provisions of section 22(1) of the Magistrate Courts Act, Cap 11 RE 2002 which confers revision powers to the District Court. He argued therefore that it was wrong for the District court to waive its duty by not defending rights of heirs of which one heir was favored out of others. He referred to the persuasive case of Rashid Abdallah Kilambwanda Vs Abdul Ally Mnawa and 2 Others, Civil Appeal No. 9 of 2010 where this court found that there was miscarriage of justice and violation of some principles of law or procedure. He argued further that the Will was not executed according to the deceased wishes by appointing the respondent as an executor instead of Page 3 of 10 Mfaume Mafala as he is healthy, ready, willing and able to execute the will. On the second ground of appeal, he cited the provision of Rule 8(b) of the Primary Courts (Administration of Estates) Rules G.N. No. 49 of 1971 which gives powers to the Primary Court to hear and decide whether any document alleged to be a Will was valid or not. He said by the time the Will was made the deceased was seriously sick and he could not write, sign or speak. He added that the house bequeathed to their step mother was jointly acquired by the deceased and appellant's mother. He contended further that the said Will is the center of his appeal because it is invalid and unjust as it favors the custodian of the Will and it disinherited the deceased's own child. He cited the provisions of Rule 38 of the Schedule to the Local Customary Law(Declaration) (No.4) Order 20 which allows the challenging of a Will in a case where an heir is disinherited without a justifiable reason which can result to the invalidation of the Will and the estate be distributed accordingly. He mentioned one Rehema Kassim Ulaya being a legitimate daughter of the deceased but disinherited from the Will without stating reason. Page 4 of 10 Arguing the last ground of appeal, he quoted in 5xtension the persuasive case of Benson Benjamin and 3 Others Vs Abdiel Reginald Mengi and Another, Probate and Administration Cause No. 39 of 2019 which made a finding that the testator was mentally impaired to disinherit the elder children and that there was no assigned reason for disinheritance. He thus prayed for this court to allow the appeal and declare the Will invalid. Going through the submissions made by the Appellant as well as the grounds of appeal, the bone of contention in this appeal is mainly on the validity of the Will in respect of whether the will was valid and if so whether the wishes of the testator were followed to the letter. In determining this appeal, I shall begin with the issue as to whether the wishes of the testator of the will were adhered to. The issue of challenging the validity of the will as to whether it was manufactured or not or that the testator did not bequeath his legal heir without assigning reason in the will, is an issue that requires evidence and it is a province of the probate court which in this case the Primary Court. The appellant erred the district court for holding that it had no jurisdiction to challenge the validity of the will because the same had Page 5 of 10 already been registered by the registrar of documents. I out- rightly agree with the appellant that such assertion is incorrect. Indeed, the district court has powers under the cited provisions of section 22(1) of the Magistrate Courts Act, Cap 11 RE 2002 to revise the decision of the Primary Court to ascertain its legality, propriety and correctness of the procedure irrespective of the same being already registered by the registrar of title. The registrar of title merely register what is presented before it but does not determine or ascertain the legality or rights on such a document. Actually, the validity of registration of the document seizes if the court nullifies such a document. Now coming to the issue of executor. Indisputably is the fact that in the instant probate case, there is a

Will. Whether the Will is valid or not is a matter of evidence. Nevertheless, I need not cite an authority here, much as this matter emanates from the Primary Court, it is a cardinal principle that where there is a Will it means the deceased dictates from the grave as to how and who should execute his estate. Unless otherwise, the deceased dictation must be followed as he/she wished. In this case both the probate court and the district court acknowledged the presence of the Will which appoint one MFAUME Page 6 of 10 MATAALA to be the Executor of the said Will However, the Respondent filed in court a petition praying for letters of administration with the Will attached claiming that the said Mfaurne Matala is very old with unstable health incapable of executing the Will. I am aware that the Primary Court moderates its own procedures. Nevertheless, in a case where an appointed executor of the probate by the deceased in a Will is incapable of executing his duty, there has to be evidence of such incapability. In borrowing a leaf from the procedure in the High Court, the appointed executor if is still alive must go to the court to denounce his ability to perform his duty as an executor or make the same be denounced by for example swearing an affidavit. It is not enough for the successor executor to simply appear in court and produce his own affidavit saying that the appointed executor cannot perform its duty. There has to be evidence to that effect which is lacking in this case. I have gone through the proceedings and the judgement of the probate court. The magistrate states on the date of hearing that the Will was read before the heirs and they were asked if there is any objection but there was none. Page 7 of 10 However, the records do not indicate anywhere who were those heirs that were present by their names and status and recorded that they did not have any objection to the Will or petition by the Respondent. If at all it is mere words of the magistrates which do not reflect anywhere in the record that the Will was read before the parties. Those parties are not disclosed and the court merely made a general note that “they” said: they have no objection. Who are “they”? Was the appellant also present on the day? The records do not reflect. What did “those” people exactly say in indicating that they have no objection, is well within the magistrate’s knowledge as it is not on the record. Out rightly, there was flouting of procedure and practice. One would probably visit the minutes (much as they do not bind the court) to see if the family knew or pointed out anything about the will or the incapacity of the appointed executor so as to appoint the respondent. There is no such important information in the purported minutes and the missing of such information leaves a lot to be desired!!! Otherwise, the respondent in a way is telling the court that he was appointed by the family to administer the estate of the deceased unaware of the existence of a Will which raise a question as to where Page 8 of 10 did he obtain the Will that he attached with his petition? Who was the custodian of that Will? At this juncture, I hasten to agree with the appellant on the first ground of appeal that the probate court erred in law and procedure for failure to ascertain the correctness of succession of the executor without concrete proof of the incapacity of the executor appointed by the deceased. That was a major irregularity which resulted to the miscarriage of justice. I would not go to the issue of whether the will was valid or not or that it disinherits legitimate heir without reasons or that the properties are also owned by other party because those are issues of evidence which is the province of the probate court in determining the validity of a Will. Thus, the cited cases of Rashid Abdallah Kilambwanda Vs Abdul Ally Mnawa and 2 Others (supra) and Benson Benjamin and 3 Others Vs Abdiel Reginald Mengi and Another do not serve any purpose at this stage. All said and

done, I find that failure by the probate court to record all those present and their statements as well as the reading of the Will in court coupled with the flouting of procedure in ascertaining the propriety of the successor executor is a major irregularity which Page 9 of 10 causes injustice. As a result, I proceed to nullify the proceedings, the decisions and the resultant orders of both lower courts i.e., the district court in Civil Revision No.4 of 2022 from Masasi District Court and the Probate and Administration Cause No.31 of 2022 from Lisekese Primary Court. Any interested party wishing to file the execution of the probate or otherwise should proceed to do so subject to the set rules and procedures of probate and administration of the deceased's estate. Following the fact that it is a probate matter, I give no order as to costs. Each party to bear its own. Accordingly ordered. R.A. Ebrahim JUDGE Mt war a 26.01.2024. Page 10 of 10

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