

TANZANIA / JUDGMENT

19770812 TZHC Mwanza

COURT
TZHCDECIDED
12 August 1977

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IN THE HIGH COURT OF TANZANIA AT MWANZA (PC) CIVIL APPELL NO, 268 OF 1975 : (From the records of the district court of Mwanza at Bukoba in Civil Appeal No 157 of 1972 - before I. K. NACHUPU, ESQO, 'DISTRICT MAGISTRATE' (CLE1--ENCL134dUKKI) 00 00 00000 000 000000000 APPPELLANT d/l FULL, Tj KIMD; tNI)

- versus 'ANTK-1C-NY RES-'O'f t f INT JUDGMENT: LUGAKINGIRA, J., IL The dispute in this suit concerns the authenticity of a purported will. I was alleged by the respondent that in 1970 the appellant - Ls conspired and forged his father's will by introducing therein a material which was intended to deprive him of his inheritance. The first appellant, Clemence Bolukeki, is the respondent's uncle and executor of the respondent's father's will. The second appellant, Bi Felista Kimwani, is the respondent's step mother, 'The respondent's father', Paulo Bashonzi Isalukcki, died on or about 28 September 1961. Previous thereto, on 23 August, 1959 he had written a will bequeathing his properties to various sons and relatives, 'However, in the exercise of his power of holding the will, there are several bequests dated 7 May 1961 It is these against which the respondent complains, claiming that they were added by the appellants in 1970. He claims: 'that the forgery was brought to his attention by a District Magistrate at Bukoba in whose possession the will had come in connection with some litigation. - After hearing the evidence, the primary court at Kibagaine found that, indeed, the will was written by the first appellant. But the court also found that this supplement was written with the authority of the respondent's father, before he died, and that he signed it. The court did so after taking into account the evidence of Vitalis Dikabeha who was present when the deceased dictated the supplement to the first appellant and who also subscribed his signature thereto. The primary court therefore held that the supplement was not a forgery. And as the said supplement did not in any way infringe upon the respondent's inheritance the court dismissed the suit for want of merits. The respondent successfully appealed to the district court. In allowing the respondent's appeal the district magistrate had this to say:- "In considering the case carefully I hold that the issue to be considered is whether a person can make an addition to his first will or he can't. The issue concerning the law it is clear no addition can be made to the first will given; but the will can only be revoked in accordance with the provisions of Para Na, 51 and 52 of Bahaya Customary Law by Cory and Hartnoll." He then set out the said paragraphs and went on to hold that the 1959 will had not been validly revoked. He therefore held the Supplement to be valid. The

appellants' appeal hereto. It is not clear that the appellate magistrate confused himself in the course of answering the issue he framed. On the other hand, the issue was whether anything can be added to a will, which he answered in the negative, his final conclusions were directed to the revocation of the will. In answer to the issue framed I would state, contrary to his views, that it is lawful to add or supplement to a will. These are technically called amendments. It should not be difficult to make such a situation arising particularly if the testator lives long after making his will and acquires additional property. As such, whether the supplement was made by the respondent's father and whether it revoked his will. I have found a difficulty in accepting the evidence of the first appellant. Apparently, the respondent's father was a forgetful old man. The will itself was concluded, twice. The supplement was concluded three times. He would add something whenever it came into his mind after conclusion. The supplement is thus signed three times by him. His signature is the same as in the parent will. I therefore agree with the primary court that the supplement was dictated to the first appellant by the deceased. This is confirmed by the corroborative evidence of Vitalis Dikabeha who subscribed his signature to this supplement. I am thus satisfied that the supplement was not written posthumously but is a genuine document. The respondent had alleged that the forgery was drawn to his attention by a District Magistrate whom he named. He did not call this Magistrate as a witness although, to my knowledge, the Magistrate has always been and remains stationed at Bukoha. His evidence was therefore pure hearsay. So called, it is a fact that the said supplement did not revoke the will. I have gone through it carefully and noted that it does not even alter an iota in the will. It only clarifies a boundary point between the respondent's brothers Edward and Yoakimu, who have no interest in this suit, and to make bequests of certain moneys,

- In the light of the foregoing, I find that the appellate magistrate erred in upsetting the decision of the primary court. I find that the will and the supplement thereto are both valid and genuine. In fact even the deceased's property was distributed according to the will so that it is purely academic talk of its revocation. Even as the respondent's inheritance law was not infringed upon in any way it is in fact doubtful whether there was a cause of action here. I accordingly allow the appeal and order the respondent to bear the costs in all the three courts, S. K. LUGID (If GIRA, JUDGE: 12/8/77

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