

TANZANIA / JUDGMENT

OCR TANZLII Barthy J

COURT
TANZLII

DECIDED
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA TEMEKE SUB-REGISTRY (ONE STOP JUDICIAL CENTRE) AT TEMEKE MISC. APPLICATION NO. 7 OF 2021 (Originating from probate and Administration Cause No. 3 of 2021) In the Matter of the Estate of the Late JOHN KACHELI MALLYA and In the Matter of Revocation of the Probate Granted to MARIAN JOHN MALLYA Between MIRIAM JOHN MALLYA.....
1stAPPLICANT BRIGHTON JOHN MALLYA.....
2ndAPPLICANT CHARLES KASUMBAI MALLYA.....
3rdAPPLICANT GRACE JOHN MALLYA.....
4thAPPLICANT VERSUS MARIAN JOHN MALLYA (Executrix of the estate of the late John Kachel Mallya).....RESPONDENT

RULING

3rd December & 20th December 2024 BARTHY, J.: This ruling arises from the decision of the Court of Appeal in Maleckzedeck John Mallya vs. Miriam John Mallya and 4 Others, Civil Application No. 67/01 of 2023, Court of Appeal of Tanzania at Dar es Salaam, delivered on 25th September 2024. The Court of Appeal ordered the determination of this application on its merits, hence this ruling. The applicants in this matter; Miriam John Mallya, Brighton John Mallya, Charles Kasumbai Mallya, and Grace John Mallya, filed an application under a certificate of urgency seeking the revocation of the grant of probate concerning the estate of the late John Kachel Mallya, which was issued to Marian John Mallya. They also prayed for the costs of the application and any other relief deemed just and equitable by this honorable court. The application was brought under section 49(l)(a), (b), and (c) of the Probate and Administration of Estates Act, Cap. 352, R.E. 2002 (the Probate and Administration of Estates Act) and Rule 29(1) of the Probate Rules, G.N. No. 10 of 1963. The application was supported by the joint affidavit of the applicants, while the respondent opposed it through a personal counter-affidavit. The hearing of the matter was resolved through written

submissions.

Representing the applicants, Dr. Sigbert Ngemera argued for revocation of the probate grant issued to the respondent in Probate Cause No. 3 of 2021. He relied on section 49(l)(a), (b) and (c) of the Probate and Administration of Estates Act, which empowers the court to revoke grants for

good cause. He cited *Kristantus Msigwa vs. Mary Masuba*, Probate and Administration Appeal No. 06 of 2019, High Court of Tanzania at Mbeya, to highlight children's rights to inherit. Additionally, he referenced *Hyasintha Kokwijuka Felix Kamugisha vs. Deusdedith Kamugisha*, Probate Appeal No. 04 of 2018, High Court of Tanzania at Bukoba, which emphasized that disinheritance requires valid justification, its absence makes the Will invalid. Dr. Ngemera contended that the Will has excluded the applicants without giving any reasons, rendering it defective. He further accused the respondent of concealing the discriminatory nature of the Will as it excluded other children of the deceased, citing case of *imeida John Mallya vs. Charles John Mallya* and another, Probate Cause No. 38 of 2010, High Court of Tanzania at Dar es Salaam, where the court emphasized on scrutinizing the validity of a Will. He further insisted that the respondent had obtained the grant based on untrue allegations, rendering the Will void ab initio. He referred to *Beatrice and Brighton Kamanga and Another vs. Ziada William Kamanga*, Civil Revision No. 13 of 2020, High Court at Dar es Salaam, which emphasized the rights of children to inherit, and the case of *Hyasintha Kokwijuka's* case (supra), asserting that the Will's failure to include the deceased's wife as a witness further invalidates it. — In conclusion, Dr. Ngemera prayed for the application to be granted with costs. Representing the respondent, Mr. Mbuga Jonathan argued that the appointment followed proper citations in the Government Gazette and Mwananchi Newspaper. Also, no objections or caveats were filed against the petition. He cited *Revenanth Eliawory Meena vs. Albert Eliawory Meena* and another, Civil Revision No. 1 of 2017 that stressed on the importance of filing caveats before appointments. He argued that the validity of a Will cannot be challenged through

- an application for revocation but must be contested via a caveat or an application for an extension of time before the executor's appointment. He referenced *Martha Basil Dismass @ Hafsa Sumana Weera vs. Danaranjani Sumana Weera & Another*, Misc. Civil Application No. 220 of 2019 (unreported), which emphasized that claims of inheritance rights must be raised through proper procedural channels. Mr. Jonathan further noted that the omission of a beneficiary does not invalidate a Will. He argued that the deceased, being a Christian, was governed by the Indian Succession Act, 1865 (the Indian Succession Act), which grants testamentary freedom without restrictions. He maintained that the applicants failed to establish good cause for revocation, citing *Cathbert Stanley Kipuyo and 3 Others vs. Sunzan Boniface Mdesa*, Misc. Application No. 338 of 2021. He also referenced *Monica Nyamakare Jigamba vs. Mugeta Bwire Bhakome* (supra) and *Ahmad Mohamed Al Lamaar vs. Fatuma Bakari*, Civil Appeal No. 71 of 2012 to emphasize the need for proper documentation to trace claims of entitlement. In rejoinder, Dr. Ngemera argued that once an appointment has been made, no caveat or application for an extension of time to file a caveat is permissible. He dismissed the relevance of the cases cited by the respondent's counsel, asserting that they addressed scenarios where executors had already discharged their duties. He specifically mentioned *Monica Nyamakare Jigamba* and *Ahmad Mohamed Al Lamaar* (supra). He further countered that the will is substantively defective and legally invalid and maintained that the respondent did not dispute the applicants' status as beneficiaries. He argued that the execution of the estate based on a defective Will contravenes fundamental principles by

failing to justify the disinheritance of beneficiaries. In conclusion, Dr. Ngemera emphasized his initial arguments and prayed for the revocation of the grant. Before delving into the merits of this application, it is essential to appreciate the long and intricate history that underpins this matter. The dispute over the estate of the late John Kacheli Mallya spans over a decade, marked by numerous court proceedings and conflicting claims. The legal journey began in 2010 with Probate and Administration Cause No. 38 of 2010 before Honourable Massengi, J (Rtd). In that case, letters of administration were granted to Charles John Mallya and Raymond John Mallya. However, on 2nd May 2013, this court revoked the grant upon an application by Imelda John Mallya, who revealed the existence of a Will, thereby altering the trajectory of the estate's administration. Subsequently, another chapter unfolded in Probate and Administration Cause No. 18 of 2018 before Honourable Mlyambina, J. In this case, Miriam John Mallya sought letters of administration. However, her petition was dismissed on 30th May 2019, leaving the estate matters unresolved. The dispute resurfaced in Probate and Administration Cause No. 3 of 2021 when Miriam John Mallya once again petitioned the court. This time, on 23rd November 2021, she was appointed as the executrix of the deceased's estate, setting the stage for the current application, which seeks the revocation of her grant of probate. This background illustrates the protracted nature of the dispute and the competing interests that have brought the parties back before this honorable court. After reviewing the series of litigations leading to this application, the court must determine whether the applicants have established sufficient grounds to warrant the revocation of the grant of probate issued to the respondent. The revocation of a grant of probate is grounded under section 49(1)(a)-(c) of the Probate and Administration of Estates Act, which states:

- 1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons-
 - (a) The proceedings to obtain the grant were defective in substance;
 - (b) The grant was obtained fraudulently by making a false suggestion or by concealing from the court something material to the case;
 - (c) The grant was obtained by means of an untrue allegation of fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently. (d) N/A J'
 - (e) N/A The applicants have advanced grounds for revocation in their joint affidavit, specifically outlined in paragraphs 4.1, 4.2, 4.3, and 4.4. Grounds 4.1, 4.2 and 4.3 are closely related and will be addressed together. On these three grounds, the applicants assert that the validity of the Will was not adequately ascertained, arguing that it unfairly excluded them as beneficiaries without justification, thereby rendering the proceedings defective. Furthermore, they contend that the probate was granted after concealing material facts, specifically that the applicants, were children of the deceased, making the Will discriminatory in nature as it excluded certain beneficiaries. The court acknowledges that a grant of probate may be revoked if the underlying basis for the grant, such as the Will, is found to be invalid due to forgery, improper execution, or failure to reflect the deceased's

true intentions. As in *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. On this ground, Dr. Ngemera, representing the applicants, argued that the respondent had petitioned for probate based on a Will that excluded certain children of the deceased, who are the applicants in this matter. He contended that their exclusion as beneficiaries rendered the Will invalid. Additionally, he suggested that the respondent was aware, through the legal disputes that began over a decade ago, that the deceased had other children apart from those listed in the Will. In response, Mr. Jonathan, counsel for the respondent, refuted the claim. He contended that the omission to include certain beneficiaries does not invalidate the Will, as the testator was a Christian, and the relevant governing law is the Indian Succession Act, 1865 (Indian Succession Act): which under section 46, a testator is permitted to dispose of their estate as they see fit, reflecting their wishes and intentions. Mr. Jonathan further argued that if the applicants had concerns, they should have pursued the appropriate legal recourse for their claims. The records from Probate and Administration Cause No. 3 of 2021 confirm that the deceased was a Christian, a fact unchallenged by either party. Consequently, the estate is governed by the Indian Succession Act, which grants a testator discretion to allocate their estate according to their wishes, provided such distribution does not contravene established legal principles. However, while the testator has the freedom to determine the distribution of their estate, this discretion is not absolute. See the case of *Joyce Raphael Bisaya vs. Eliya Raphael Bisaya and another*, Civil Case No. 2/2020, High Court, Tabora at page 8 (unreported), it has been held that a will expresses a testator's intentions regarding their property posthumously. It is well-established under customary law, which may be applied alongside statutory law, that a testator disinheriting an heir must provide justifiable reasons for doing so, especially when primary heirs are involved. This aims to ensure that testators cannot unjustly exclude primary heirs from inheritance based on arbitrary or capricious reasons. Section 30, read together with Section 29 of the Indian Succession Act, underscores the legal rights of children and spouses in intestate succession, establishing a presumption that these groups are primary beneficiaries, which is also considered in testate probate. Two of the applicants, in their joint affidavit, attached birth certificates to substantiate their status as children of the deceased. While one birth certificate was issued after the deceased's death, the other was issued during his lifetime. Nonetheless, this evidence suggests that there are applicant(s) who are indeed children of the deceased, that are not included in the Will without any reason to justify it. The principle of equity dictates to consider the testator's intentions, as articulated in their Will, which must not only reflect personal wishes but also adhere to their legal and moral duty to ensure fair treatment of all heirs. This principle upholds the rights of beneficiaries, particularly those entitled to inherit by virtue of their legal relationship with the deceased, and seeks to prevent any form of discrimination or injustice. In the case of *Allen Rutatekururwa Rugazia vs. Perfectos Ruteganya*, Civil Appeal no. 530 of 2022, Court of Appeal stated; "...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]. However, this court finds it necessary to scrutinize the validity of such Will. As the Will that excludes certain heirs, particularly children whose relationship with the deceased is substantiated by evidence, without leaving any part of the estate to be administered for their benefit, undermines this fundamental principle and raises questions about its validity. In the present case, the Will that served as the basis for granting probate, reflects the deceased's intention to distribute his estate among his wife, children, and other individuals. The omission of some of the children raise a legitimate doubts about its validity. Such a scenario conflicts with the testator's obligation to balance personal preferences with the duty to ensure equitable treatment of all legal heirs. Upon analyzing the grounds raised, this court finds that the applicants have demonstrated that the grant of probate was obtained in violation of section 49(1) (c) of the Probate and Administration of Estates Act. Specifically, the deceased's Will excluded certain children from the distribution of his estate, thereby denying them their rightful inheritance under the law and subjecting them to discriminatory treatment. This omission, whether made in ignorance or inadvertently, constitutes sufficient grounds to invalidate the Will. Consequently, the Will of the deceased, John Kacheli Mallya, is hereby invalidated for being discriminatory. These three grounds are sufficient to dispose of the application without addressing the remaining factor for revocation. Following this determination, the court annuls the grant of probate issued to Marian John Mallya, who was appointed as the executrix of the deceased's estate. The respondent is ordered to surrender the grant of probate to this court within 30 days from the date of this ruling. Additionally, the respondent must hand over all assets collected in the capacity of executrix to a person, to be duly appointed by this court to administer the deceased's estate. Any interested party may petition this court for letters of administration for the estate of the deceased. Considering the familial relationship of the parties involved, this court refrains from giving any order as to costs. It is so ordered. Dated at Temeke this 20th December, 2024. Delivered in the presence of Mr. Hilary Malasa learned advocate for the all applicants, Mr. Hanc Mlindoko learned advocate for the Respondent and Ms. Bernadina Tayari RMA.

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