

TANZANIA / JUDGMENT

Monica

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (BUKOBASUB REGISTRY) AT
BUKOBASUB CIVIL APPEAL NO. 12144 OF 2024 (Arising from the District Court of Muieba in Civil
Appeal No. 74 of 2023 and original Probate Case No. 10 of 2023 at Nshamba Primary Court)
MONICA SYLIVESTER..... APPELLANT VERSUS PRISCA
RWAKYAYA..... RESPONDENT

JUDGMENT

17/09/2024 & 25/10/ 2024 KIWONDE, J. The appellant, Monica Sylivester, filed an application for letters of administration before Nshamba Primary Court seeking to be appointed as administratrix of the estate of her late husband one Sylivester Matogo Rwakyaya. At the end she was appointed and ordered to collect and distribute all the deceased estates to the heirs except the farm which is located at Katikabulale-kabale as stated in the ruling in Probate Application No. 10 of 2023. Aggrieved by the decision of the trial court, the appellant unsuccessfully appealed to the District Court of Muieba. The appeal was dismissed for lack of merits. i The appellant was dissatisfied with the decision of the first appellate court hence, the present second appeal based on eight (8) grounds of appeal, which are:

1. That the first appellate court erred in law and in fact by without (sic) considering that the appellant did prove that the suit land belongs to the late Sylivester Matogo Rwakyaya.
2. That the first appellate court erred in law and in fact to consider that the WILL left by the late Sylivester Matogo Rwakyaya was valid.
3. That the first appellate court erred in law and in fact by invoking (sic) that the WILL tendered was forged the fact which was not proved.
4. That the first appellate court erred in law and in fact without considering exhibits (sic) tendered in making analysis of the evidence hence, reaching to injustice (sic) decision.
5. That the first appellate court erred in law and in fact without considering that the ruling issued was inconsistent with the proceedings of the trial court.
6. That the first appellate court erred in law and in fact in analysing the evidence of the trial court as the appellant's evidence was heavier than that of the respondent. 2

7. That the first appellate court erred in law and in fact by re- evaluating the evidence favouring the respondent while the appellant proved that he late husband Sylivester Matogo Rwakyaya was allocated the suit land after the court decision was issued.
8. That the first appellate court erred in law and in fact without considering that the trial court proceedings were tainted with illegalities. The appellant prayed the appeal be allowed with cost and quash the decisions of the first appellate and trial court and any other relief the court deems fit and just to grant. During hearing of this appeal, the appellant was representing by Mr. Derick Zephurine learned counsel while the respondent appeared in person. In supporting the first, fourth, fifth, sixth and seventh grounds of appeal, the learned counsel for the appellant submitted that the property claimed by the respondent belongs to her late husband one Sylivester Matogo who acquired it on 12/04/1988 since in exhibit DWE3, the deceased bought the farm from Libent. Also, the counsel said in exhibit DW-E2, it is shown that the appellant has a share in it but the respondent was not mentioned among the beneficiaries as the farm was distributed among the heirs by 3 the clan members and her evidence is supported by SMI and exhibit DWE4 proves ownership of the land in dispute. The learned counsel submitted that the judgment of the primary court did not discuss the documentary evidence and the first appellate court did not consider it so as to identify the owner of the property in dispute. He argued that documentary evidence cannot be overridden by the oral evidence. He was of the view that the appellant proved the ownership of the said land in dispute at the higher standard by tendering documentary evidence. Apart from that, the learned counsel argued that before the primary court the respondent stated that she acquired the land in dispute in 1983 while her witnesses testified different; that the land in dispute was distributed in 1968. He said the respondent failed to prove when she acquired the said farm. The learned counsel said that he who alleges must prove that those facts exist. He cited the case of Fidelia Leonce and another Versus Ladislaus Leonce, Land case Appeal No. 33 of 2023. In the second ground of appeal, Mr. Derick Zephurine submitted that the first appellate court failed to consider that the WILL was valid. According to him the said WILL was valid because witnesses were involved including the clan members and friends and he prayed for this court to declare it 4 valid since at the first appellate court it was said that the WILL was forged but there was no evidence to that effect. According to him this was misdirection. To support this point, he cited the case of Twazihirwa Abraham Mgema vs James Christian Basil, Civil Appeal No. 229 of 2018, Court of Appeal of Tanzania. On the eighth ground of appeal, the learned counsel submitted that there was error in the trial court proceedings. He argued that the court determined application and the objection at the same time. He was of the view that the court had to determine objections first and that the parties were heard on the objections only. In reply, the respondent submitted that the trial court visited the locus in quo and it was satisfied as the clan members were there to testify. She therefore prayed for this court to uphold the decision of both courts below. In his rejoinder submissions, the counsel for the appellant merely reiterated what was stated in the submissions in-chief. From the records and submissions from both parties, the issue for determination is whether this appeal is

meritorious. I have opted to begin with the eighth ground of appeal. The appellant said the trial court's proceedings are tainted with illegality on reason that the 5 trial Magistrate erred to determine both the application and objection at ago. It is true that where a caveat is entered, it has to be determined first to see if it will negatively affect the petition. If not, it follows hearing of main application. In this appeal, the records show that there was a caveat raised by the respondent protesting the landed property, a farm located at Katikabutale-Kabale from being included in the estates of the deceased Sylivester Matogo Rwakyaya. But the respondent did not object the appointment of the appellant as administratrix of the deceased estate. So, it is obvious that the petition for grant of letters of administration to the appellant was not opposed. The trial court, thus, heard the caveat per se. It follows therefore that there is no illegality. This ground of appeal lacks merit. Reverting to the rest of the grounds of appeal, in law, the second appellate court should rarely interfere with the concurrent findings of the two courts below on matters of fact unless it is found that there was mis-direction or non-direction or misapprehension of evidence, there was miscarriage of justice or violation of the principles of law and practice which occasioned into injustice. In the appeal at hand, the main matter in controversy was the ownership of the land in dispute whether it formed part of the deceased estate or not. It is trite law that he who alleges must prove and the standard of prove in civil cases is on the balance of probabilities. The position was stated in the case of Paulina Samson Ndawanya v. Theresia Thomas Madaha, Civil Appeal No. 45 of 2017, Court of Appeal of Tanzania. Before the trial court, the respondent stated that she inherited the property in dispute from her father Rwakyaya Kajunaki in 1968 and it is jointly owned by Prisca Rwakyaya, Sylivester Rwakyaya and Spensioza Tibimpingula Rwakyaya and she managed to state the boundaries. The respondent's evidence was corroborated by that of Paschal Thiliphone, Spensioza rwakyaya and Winfrida Rwakyaya. These witnesses said the appellant did not know about their inheritance of the land since she was married to Sylivester Matogo Rwakyaya in 1987 while they inherited the land in 1968. When the appellant testified in court, she said she was merely told by her late husband before his demise that the farm in dispute solely belonged to him. In my view, this piece of evidence was a hearsay one which is inadmissible. In proving that the farm belonged to her late husband, the appellant tendered her husband's WILL (DWE1), exhibit DWE2, a paper which shows how Rwakyaya Kajunaki distributed his property including the farm in dispute to his beneficiaries; and exhibit DWE3 which are the sale agreements. I concur with the learned counsel for the appellant that oral evidence cannot override documentary evidence. However, the said agreements (DWE3) are silent on where the said farm is located and therefore it is difficult to know if it is the same farm in dispute. The said sale agreements are of Croneli Rukelele, Isaac Rwakyaya, Daliyanyesi Kikolo and Sabina Paulo. So, the documents were not useful and sufficient to prove that they sold him the same farm in dispute. In exhibit DWE2, it is the paper which the clan members (Wanyaluganda) distributed the farm of Rwakyaya Kajunaki to Sylivester Rwakyaya, Faustine and Libenti. This was on 12/04/1988. Yet, the document is general. It does not specify which farm was distributed to those beneficiaries. Thus, it did not establish if it was the same farm in dispute. Besides that, the other documentary evidence was the alleged typed WILL, left by

the late Sylvester Matogo Rwakyaya in which the farm in dispute was just mentioned therein. But its validity was challenged or objected on ground that it was not written and signed by the late Sylvester Matogo Rwakyaya because at the time when it was written, he 8 was sick, (stroke-stricken). This meant that he could not sign it and or understand the contents thereto. The fact was not disputed or disproved. In law, the test as to the validity of the WILL, was outlined by the Court of Appeal of Tanzania in the case of Mark Alexander Gaetje and 2 Others vs Brigitte Gaetje Defloor, Criminal Revision No. 3 of 2011 that the WILL has been properly executed, the testator must have had the capacity to make the WILL, there was no undue influence, whether there was no forgery and fraud or not and whether the WILL has been revoked or not. If the Will passes all the that test enumerated above, it is taken to be proved, and the court grants the executor the powers to administer the WILL. The trial Magistrate in discrediting the document said those people who are said to eyewitness the late Sylvester Rwakyaya making the WILL were not brought to testify in court. But the appellant was not the objector, so, she had no duty to prove so. However, the document merely mentioned the farm to belong to the deceased Sylvester. The WILL is not a conclusive proof of ownership of the property by the deceased for it can be tainted with irregularities like fraud or forgery. In this appeal, it was indicated that when the WILL was alleged to have been made, the late Sylvester Matogo Rwakyaya was sick as he was stroke stricken. It means he was incapable 9 of understanding it. This also made the trial court to believe that the WILL was not valid. Therefore, the document alone did not prove that the land in dispute was among the deceased estates. Leave that alone, the trial Magistrate visited the locus in quo and was satisfied that the farm was not among the deceased estates. The seller, said to be one Libent, the fact that he sold the land in dispute to the deceased is not proved. From the foregoing observation, i find and hold that all grounds of appeal are wanton of merits. As a result, the appeal lacks merits and it is hereby dismissed. I make no order as to cost since the parties are relatives. Dated at Bukoba this 25th October 2024. F.H. KIWONDE JUDGE 25.10.2024 Court: Judgment is delivered in chamber in the presence of the appellant, the respondent and Grace Mutoka (RMA) this 25th October 2024 and the right of further appeal is explained, p- F.H. KIWI JUDGE 25.10.2024 io

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