

TANZANIA / JUDGMENT

20070703 TZHC Dar es Salaam

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1 IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM PC. CIVIL APPEAL NO. 89 OF 2002
(Originating from Civil Appeal No. 22 of 1999 District Court of Kinondoni) . RUKIA ISMAIL
..... APPELLANT VERSUS JUMA MANZI RESPONDENT-
Date of last order - 3/5/2007 Date of Judgment - 3/7/2007

JUDGMENT

Shangwa, J. This appeal was filed by Rukia Ismail a long time ago on 12/6/2002. It is against the decision of Kinondoni District Court in Civil Appeal No. 22 of 1999 _which originated from the decision of Kinondoni Primary Court in Probate and Administration Cause No. 240 of 1994. The Respondent Juma Manzi was appointed by the Primary Court of Kinondoni in the above mentioned cause as 2 an administrator of the estate of the late Saidi Manzi who died on 25/11/1994. The said Juma Manzi (Respondent) is the son of the said deceased. The Appellant Rukia Ismail was the wife of the deceased but she never had any child with him. The deceased was survived with two children including the Respondent who were borne by another woman. The deceased was a seaman and he died a poor man. He left behind a small house and a few households at Kinondoni shamba/Mwananyamala "A" , Mwinjuma street, within Kinondoni District. The said house is marked as No. Mwsh 436. -- On 30/3/2004, this court was informed by Mr. Mpuya, Advocate who was holding brief of Mr. Mgongolwa, Advocate for the Appellant that the Appellant passed away on 29/11/2003. On 25/8/2006, Mr. Mgongolwa informed this court that one Hamisi Ali was appointed as administrator of the estate of the deceased Appellant Rukia Ismail and 3 prayed this court to make him a party in these proceedings as a legal representative of the deceased Appellant. His prayer was granted. Earlier before her death, the Appellant was claiming that the small house at Kinondoni shamba was given to her by the late Saidi Manzi. She tendered a written document before the primary court which was marked as exhibit 2 and referred to as a will to prove that the said house was given to her by the deceased, and that therefore, the rest of the deceased's heirs who are the deceased's two children have no right to inherit it. Her claim was dismissed by the primary court of Kinondoni Tuwa S.S., PCM. In his decision, the said Magistrate invalidated exhibit 2 saying that -- it has no qualities of a will. The reasons he gave for invalidating it are that the deceased knew how to write but that exhibit 2 is not in his own handwriting and was not witnessed and signed by two clan members and another person who is not a clan member. He said exhibit 2 was signed and witnessed by several persons making it so open 4 as if there was no secret about it which is contrary to what a will should be.

Furthermore, he said that at the time of writing it, the deceased was not in good mental condition due to illness. After invalidating exhibit 2, the primary court magistrate granted the Letters of Administration of the deceased's estate to Juma Manzi (Respondent) and held that as the deceased was a Moslem his estate should be distributed in accordance with Islamic law, and that the Appellant who was the wife of the deceased should be given her share which is 1/ 3 of the whole estate. I '

- The Appellant was not satisfied with the said decision and she appealed to the District Court of Kinondoni. The said court Wambura, D.M. upheld the decision of the Primary Court and dismissed her appeal with costs. In delivering the District Court's judgment, Wambura, DM agreed with Tuwa, S.S. PCM that exhibit P2 is invalid for 3 prayed this court to make him a party in these proceedings as a legal representative of the deceased Appellant. His prayer was granted. Earlier before her death, the Appellant was claiming that the small house at Kinondoni shamba was given to her by the late Saidi Manzi. She tendered a written document before the primary court which was marked as exhibit 2 and referred to as a will to prove that the said house was given to her by the deceased, and that therefore, the rest of the deceased's heirs who are the deceased's two children have no right to inherit it. Her claim was dismissed by the primary court of Kinondoni Tuwa S.S., PCM. In his decision, the said Magistrate invalidated exhibit 2 saying that it has no qualities of a will. The reasons he gave for invalidating it are that the deceased knew how to write but that exhibit 2 is not in his own handwriting and was not witnessed and signed by two clan members and another person who is not a clan member. He said exhibit 2 was signed and witnessed by several persons making it so open 5 having been written when the deceased was seriously ill and mentally not fit. The Appellant was not satisfied with the decision of the District Court and appealed to this court. In her memorandum of appeal, she raised two grounds of appeal. First, that the District Magistrate erred both in law and in fact in holding that exhibit 2 is null and void as it was written while the deceased was seriously ill. Second that the District magistrate erred in law by entertaining the matter to be handled by a holder of Power of Attorney while the Respondent was a delegate by virtue of his appointment as administrator.
- On the first ground of appeal, it was contended by counsel for the Appellant Mr. Mgongolwa that the question of the deceased's mental fitness at the time of writing exhibit 2 is a medical issue which calls for expert opinion, and that the District Court's opinion on the issue of the deceased's mental fitness at the time of writing exhibit 2 is '\ 6 mere assumption which is not backed by evidence on record. He said that the District Magistrate was right when she held that the document was a transfer deed and not a will but that she was not justified to hold that this document was void. He prayed the court to quash the judgment and decree of the District Court with costs and to hold that the house in question is the property of the Appellant. On the second ground of appeal, it was contended by counsel for the Appellant that the District Magistrate erred in law by entertaining the mater to be handled by a holder of power of Attorney while the Respondent himself was a - delegate by virtue of his appointment as Administrator. He said the purported powers of Attorney could not lawfully be granted as in law even the Administrator is a delegate by virtue of his

appointment and that he could not lawfully delegate such delegated powers to him. Furthermore, counsel for the Appellant contended that the holder of 7 Power of Attorney did not bother to tell the court why he was holding Powers of Attorney as there are legal circumstances which validates the Powers of Attorney and that surprisingly the District Magistrate found this to be proper. In reply to the first ground of appeal, the Respondent submitted that there is evidence of PW4 and PWS which was recorded by the Primary Court to show that the deceased's mental condition was not fit due to illness. He contended that the Primary Court Magistrate and the District Court Magistrate did not err in finding that at the time of writing

- exhibit 2, the deceased was not in good mental condition and that the question as to whether or not the deceased was not mentally fit at the time of writing exhibit 2 does not require any expert opinion. He said that the action of invalidating exhibit 2 by the courts below was correct. ' ' 8 In reply to the second ground of appeal, the Respondent submitted that the question as to whether or not it was proper for him to be represented by a holder of Power of Attorney in the District Court had been raised by the Appellant's Counsel in form of preliminary objection, and that it was later agreed between the parties that the matters raised in the preliminary objection should not delay the hearing and determination of the main appeal on merit. He argued that as this question had been raised and settled between the parties it is not proper to raise it in this appeal. He said, he decided to give power of attorney to one Yusufu Ally to represent him in court as he was away in Zanzibar
- from where he went to Namibia for studies. He prayed the court to dismiss this appeal. On the first ground of appeal, I am of the view that the District Court of Kinondoni did not err in upholding the decision of the Primary Court of Kinondoni in Probate and 9 Administration Cause No. 240 of 1994 which held that exhibit 2 which was tendered by the Appellant to prove that the small house in dispute at Kinondoni shamba/Mwananyamala "A" Mwinjuma street was given to her by the late Saidi Manzi is null and void. I share the opinion of the Kinondoni District Magistrate that at the time of writing exhibit 2, the deceased was not mentally fit to be able to decide anything. Evidence on record do show that at the time of writing the said exhibit, he was critically ill. Exhibit 2 was written on 25/11/1994 and the deceased died on the same day as per his death certificate No. 00067929. This means that at the time of writing the said exhibit, his
- mental state and his thinking capacity had deteriorated a great deal. In his judgment, the Primary Court Magistrate referred to exhibit 2 as a will but said that it lacks the qualities of being a will. The District Magistrate did not comment on 10 this. Personally, I wish to comment that exhibit 2 is not a will. It is a land transfer document. I have discovered that this document is written in the handwriting of one Thomas B. Numbi and that it was written when the deceased was about to die. As I have already stated, the District Magistrate was not wrong in sharing the opinion of the Primary Court Magistrate that exhibit 2 is null and void. But even if we are all wrong, myself and the Magistrates in the two courts below in holding that exhibit 2 is null and void, the weight to be attached to it is zero. I say so because had the

deceased wanted to transfer his house to the Appellant who was his wife in consideration of love and affection, he

- should have made all efforts before he fell ill to transfer it in her name. I hold therefore that there is no sufficient evidence to show that the small house in issue was given to the Appellant by the deceased. For this reason, the said house .• 11 is part of the deceased's estate. As it was correctly decided by both courts below, the Appellant is entitled to 1/ 3 of her share from the deceased's estate. As the Appellant passed away in the course of the proceedings, 1/ 3 of her share mentioned above has to be given by the respondent who is administering the deceased's estate to her heirs if any. On the second ground of appeal, I do not think that the District court of Kinondoni was wrong by allowing one Yusufu Ally, a holder of Power of Attorney given to him by the Respondent to represent him in Misc. Civil Appeal No. 22 of 1999. Under Order 111 r.r. 1 and 2 of the Civil Procedure - Code, an Administrator of the deceased's estate like any other party to the suit is entitled to be represented in court by his recognized agent in a suit relating to the estate which he has been appointed to administer. A recognized agent may be a person holding the Powers of Attorney or an Advocate. In this case, as the Respondent was outside the "t 12 country in Namibia when the appeal was proceeding in the District Court, it was not wrong for the District Court Magistrate to recognize the appearance of Yusuf Ally who was holding his Powers of Attorney when he was outside the country. In general, I find that this appeal has no merit. For this reason, I hereby dismiss it with costs. ~ A. Shangwa JUDGE 3/7/2007 court this 3rd day of July, 2007 in the a■ presence of Mr. Mgongolwa for the Appellant and in the presence of the Respondent appearing in person. ~~ A. Shangwa JUDGE 3/7/2007 „,:

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