

TANZANIA / JUDGMENT

rose andwedisia tilya vs emmanuel christopher tilya 2022 tzhc 11132 14 february 2022

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI DISTRICT REGISTRY AT
MOSHI CIVIL CASE NO. 8A OF 2021 (Originating from Probate and Administration Cause No. 2 of
2021 in the High Court of Tanzania at Moshi) ROSE ANDWEDISIA TILYA
PLAINTIFF VERSUS EMMANUEL CHRISTOPHER TILY A DEFENDANT

JUDGMENT

MUTUNGI .J. The Plaintiff Rose Andwesia Tilya petitioned for Probate proceedings before this court in Probate Cause No. 2 of 2021 regarding the estate of the late Andwedisia Abernego Tilya; (her father) who passed away on 5th November, 2020, The plaintiff claimed her late father left a Will dated 27th March, 2017 which appointed her to execute her father's wishes as per the Will. The petition was contested by the defendant through a caveat hence the instant case in terms of section Page 1 o f 25 52(b) and 54(3) of the Probate and Administration of Estate Act, Gap 352 R.E. 2019. On the other hand, the defendant, Emmanuel Christopher Tilya, [the deceased grandson), contested the petition on the grounds that, the stated Will was invalid and forged as the deceased had another Will dated 27th July, 2015 wherein his father was appointed as the executor of the deceased's estate. Since his father who is now deceased had passed away in 2019, the clan meeting nominated him to take over his place and appointed him to execute his grandfather's estate. Further at the time the purported Will was made, the deceased was an old man of 95 years and ailing. He thus had developed loss of memory. More so by the time the purported Will was read out it had not been signed nor sealed by Advocate Elizabeth Maro Minde (PW2). The said Will was intending to distribute properties already distributed by the deceased to his sons and blood relatives before his death except for the house situate at Shah Tours .It was the defendant's further concern that, the plaintiff intends to administer the estate contrary to the express wishes of the deceased in his Will dated 27th July,

2015. Despite all of the above, during the deceased's life Page 2 of 25 time the plaintiff had meddled with his landed properties already allocated to his sons and grandsons. He therefore filed a caveat subject of this judgment praying the 2017 Will introduced by the plaintiff be declared invalid and alternatively this Court appoints him to execute the 2015 Will and administer his grandfather's estate. Before commencement of the proceedings, the following issues were framed for determination: -

- (1) Whether the Will dated 27/3/2017 was valid.
- (2) Whether the petitioner or caveator should be appointed the Executrix of the Estate.
- (3) What reliefs are the parties entitled to. During hearing of this matter, the Plaintiff enjoyed the legal services of Mr. Martin Kilasara, learned advocate whereas Mr. Charles Mwanganyi represented the defendant (caveator). The Plaintiff and Defendant had two witnesses each. PW1, Rose Andwedisia Tilya (the plaintiff), narrated, the deceased (her biological father) passed away on 5th November, 2020. She tendered the death certificate which was admitted as Exhibit "P I". After the deceased's burial at Kikarara, Kilembe (Moshi Rural), she immediately left in order Page 3 of 25 to attend another burial only to receive a phone call from Advocate Minde informing her there was a Will left by the deceased appointing her his executor before his demise. The advocate called upon her to make follow up on the reason that, she had gone to read the same to the family members but they had refused to hear her out. PW1, contended further that this is when it came to her knowledge that the Will had appointed her as the Executor of the Will to administer her father's estate. The said Will dated 27th March, 2017 was admitted as Exhibit "P2". According to PW1, the properties left behind and their division is as follows: -

1. Kilembe farm to be distributed to Emmanuel Christopher (the deceased's grandson), Sylvester Jacob Tilya (the deceased's grandson), Andrew Jacob Tilya (the deceased's son), Anna Jacob Tilya (the deceased granddaughter), Sarah .A. Tilya (the deceased's daughter) and Dora .A. Tilya (the deceased's daughter). Page 4 of 25
2. Livestock, one cow to be given to Sylvester and Emmanuel Christopher. The goats be given to Emmanuel Christopher.
3. The premises at Shah Tours be given to Rose .A. Tilya (the plaintiff/petitioner).
4. The farm at Natsini be given to the children of the late Hedson Tilya and the children of the late Robert Tilya (3 acres).
5. Sisal farm be given to Elfuraha Malisa and Emmanuel Christopher.
6. The paddy farm at Munono be given to Estemani .A. Tilya (1 acre), Emrod Anase Tilya be given % and % to Emmanuel Christopher.
7. The area at Kifunyi be given to the children of the late Herson .A. Tilya.

8. The area at Babati, Manyara be given to Mathayo Justin Maro. She stated all the above properties had never been distributed to anyone and that, she believed her father was of sound mind when making the Will. She added, although the deceased walked with crutches, he could still read the bible and newspapers very well, thus it was not true that he Page 5 of 25 had loss of memory by then. She also acknowledged that, she was not in the meeting that was convened to distribute her father's estate prior to his death, however, since she is the only one appointed the executor, she prays to be legally appointed and proceed to distribute the deceased estate per the Will. On cross examination she acknowledged, her name appears only on the cover page of the Will and that the deceased signed by putting a thumb print on the third page of the Will only. She also stated the Will was witnessed by Daudi Isaria Maro the deceased tenant at the Shah Tours premises and Hoise Gerald Mandara, his cousin. She went on denying the fact that, she had a long dispute with her late father over the Shah Tours house. PW2, Elizabeth Maro Minde, testified she is a private Advocate and owner of a Non-Governmental Organization known as Kilimanjaro Women Information Exchange and Community Organization (KWIECO) that operates within Moshi and Tanzania in general. She testified among her duties include, offering legal assistance such as writing Wills, reconciliation and drafting of legal documents. She further stated to have known the deceased since childhood. In the year 2017 before his death, he summoned her and gave her Page 6 of 25 instructions to put his affairs in order especially regarding his properties. He also mentioned that he wanted (PW1) Rose Andwedisia Tilya to be the executor of his estate. He gave her a sketch map indicating his wishes on the distribution of his properties, thus, PW2 drafted a Will to that effect. After going through the draft he directed her to summon one Hoise Mandara and one Mr. Daudi Maro asking them to meet on 27th March, 2017. On that day the Will was finalized by both the deceased and his witnesses signing, and she accordingly attested the same. PW2 explained further that, at the time of writing the Will, the deceased was of sound mind with a good memory and he knew how to read and write but due to his old age he signed by putting a thumb print. She then sealed and kept the said Will in her office until when she heard of the deceased's death. She clarified further, she went to the clan meeting with the said Will, read it out and left them to deliberate on the estate. She denied having known of the existence of another Will written way back in the year 2015. She vehemently stated before the court that, the Will was sealed before she read the same in clan meeting. Page 7 of 25 When cross examined, PW2 stated it is not a legal requirement for a maker of a legal document to sign on each and every page. She specified among the two witnesses, Daudi Isaria Maro was the deceased's long-time tenant and close confidant whereas Hoise Gerald Mandara was the deceased first cousin. She also stated, those witnesses never read the Will, thus they did not know what was written therein as their duty was merely to sign the Will. PW3, Daudi Ehsaria Maro, a business man and a tenant at the Shah Tours house testified, he knew the deceased for more than 32 years, thus, they were good friends. He told the Court that, before his death, the deceased summoned him to his home where he met Hoise and Advocate Minde (PW2). He was then told to sign a document which he did using a pen and not knowing the contents therein. He did this and left soon after the signing. He further recalled after the deceased's death and burial, PW2

showed them the Will before a clan meeting but there were a lot of misunderstanding as the clan members refuted the said Will and appointed Elisonguo Tilya (the deceased's younger brother) to be the administrator but he also Page 8 of 25 declined. Since they refused to listen to PW2, she returned the Will in the envelope and left. During cross examination he stated, he is still a tenant in the deceased property paying rent to PWT (the deceased daughter). He also clarified, when PW2 appeared to read the Will to the clan members, the envelope was not sealed. More so, he wrote his name and signed with a pen and wondered how it happened that the same was appearing in a computer generated format. DW1, (the defendant) Emmanuel Christopher Tilya, deceased's grandson testified that, Rose Andwedisia Tilya is his aunt and that he contests her appointment because the Will before this court was written after the deceased lost his memory. Moreover, there were no four witnesses as required by law. To make matters worse, PW2 after reading the same before the family members admitted, the same was not signed nor attested to as required by law and promised to fulfil this requirement but after she left with the said will, surprisingly enough she never went back. He testified further, during the family/clan meeting, PW2 appeared with the unsealed Will, took out the same and read it out. The said Will had appointed PW1 as deceased's choice to execute his estate. There ensued a lot of questions, confusion and Page 9 of 25 misunderstandings since by 2017 the deceased's relatives were aware he had already lost memory. The clan members wondered how the deceased would have managed to write a Will in such state of mind. DW1 added the family members questioned the validity of witnesses Daudi Maro and Hoise Mandara without the attendance of close relatives. The reality being that the alleged Will writing process was performed at the deceased premises where his close relative reside. Still contesting the 2017 deceased's Will, DW1 went on testifying, the clan chairman (Heri Heriamini Mshiu) produced yet another envelope dully sealed during the meeting. He presented the same before the clan meeting which had been prepared by Advocate Shayo dated July 2015. It was read out and it mentioned the deceased's last born, one Christopher Andwedisia Tilya as the administrator of his estate. The said Christopher was DW1's father who had passed away on 28th December, 2019. As a result the family meeting proposed the defendant to be the executor taking up his father's position. He was handed over the said Will and Page 10 of 25 the same was admitted as Exhibit "D1". The clan meeting minutes were also admitted as Exhibit "D2". It was DW2's further testimony that, according to the said Will, all of the deceased properties had already been distributed by the deceased himself during his lifetime. The Will also mentioned his children those who had been bequeathed and those who had not been bequeathed. The only property which was not distributed was the house at Shah Tours. DW2 raised his concern that, the 2017 Will filed in this court has PW1's name written on the front cover page only and there is no mention of her name on the other pages. To put salt to the wound, the Advocate (PW2) did not attest to the impugned Will, and the same redistributed properties which had already been distributed since 1970's. In his settled view, he noted the same creates doubt on the authenticity of the Will. DW2 further told the Court that, the deceased and PW1 had not been in good terms for a while, forcing him to give her the Shah Tours house since 2009 but the deceased adamantly refused to do so. In 2016/2017 after she realized her father had lost

memory, she summoned a Lutheran Priest Page 11 of 25 who tried to force him to give her the said house otherwise the church would not attend him spiritually. Still the deceased refused to heed to the said demand. He prayed in view of the evidence from his side, the objection raised be sustained and he be appointed to execute the 2015 Will fairly to all the beneficiaries. During cross examination, DW1 stated, the 2015 Will was written by Advocate Peter Jonathan Mushi who is still alive to date and he does not how the Will passed from the said Advocate to Heri Heriamin Mushi (the chairman of the clan meeting). He stated further, the Shah Tours house was built by the deceased, PW1 added 4 rooms so that the deceased could collect rent therefrom as a source of income. DW2, Heri Heriamini Mushi, testified, he knew the deceased as their clan chairman and he was very close to his family thus he treated him as his father. He remembers in the year 2015, he was summoned by the deceased, as he wanted to prepare his Will at Advocate Jonathan's office. After the Will was written, together with other witnesses including Elisonguo Tilya signed and the deceased asked him to keep it in safe custody fearing his children might temper with it. After his Page 12 of 25 burial is when he produced and read the same to the clan and family members. This was after PW2 reading out the 2017 Will which she had kept in an envelope not sealed and the same initiated chaos. PW2 had then requested to go and dully attest the said Will and complete the process. He testified further (PW1) the deceased's daughter had differences with her late father on the Shah Tours house since she claimed the house was hers whilst the deceased claimed it was his lawful property. DW3, Sarah Andwedisia Tiiya, testified that, the deceased was her biological father and after his burial, PW2 brought a 2017 Will before a clan meeting held on 12th November, 2020 and read it out. A number of questions arose among which was the number of witnesses present, the fact that the Will was not sealed and that the same was not fully finalized by PW2. More so, PW2 had a sketch map accompanying the Will which she handed over to the high table and left with the Will so that she can sign and rubber stamp the same. She also told them anyone doubting the Will should seek legal assistance on the coming week which was a law week. DW2 went on testifying, there was a doubt raised on the deceased's state of mind as he had long lost memory. She Page 13 of 25 added, after Advocate Minde left with the Will which she did not show anyone, the clan chairman also produced a 2015 Will. The same revealed the deceased's estate had been distributed except the Shah Tours house and thereafter all members in attendance unanimously conceded the same was a legal Will and proceeded appointing DW1 as the executor. She also testified, she remembers on 7th January, 2015, the deceased summoned his family [relatives, children and grandchildren] and distributed his properties. However, PW1 and one Estomani Tilya did not attend. He left the Shah Tours house undistributed, which was used to cater for his well-being till his death. She prayed the executor of the deceased's estate be as per the 2015 Will. After the court hearing the testimonies from both parties, the learned advocates filed their final submissions. Starting with plaintiff's advocate, Mr. Kilasara, on the onset submitted, the deceased died testate leaving behind two Wills. He asserted that, Rule 23 to the third schedule of the Local Customary law (Declaration) No. 4 Order, GN No. 219 of 1967 permits a Will to be amended. In that regard, of the two Wills that of 27th Page 14 of 25 July, 2015 and 27th March, 2017, the latter is the last valid Will of the deceased. On the 2nd issue, Mr.

Kilasara submitted, as per section 24 (1) and (2) of the Probate and Administration of Estates Act, Cap 352, R.E. 2019, administration of the estate may only be granted to the executor appointed by the Will which may be express or by necessary implication. In the matter at hand the plaintiff was appointed by the deceased by necessary implication thus deserves to be granted probate unlike the defendant who was never appointed even by the 2015 Will. In the end, the learned advocate concluded the defendant's caveat be overruled, plaintiff be granted probate on the reason she was duly appointed by the deceased himself, by virtue of being his daughter and legal beneficiary of his estate. On the other side of the coin, Mr. Mwanganyi averred, the 2017 Will is not valid since by the time it was made the deceased was of old age i.e. 95 years, diabetic and was sick from time to time until his demise in 2020. He also had encounters of losing memory thus, his reasoning was impaired hence not rational enough to make major Page 15 of 25 decisions. Further, after the said Will was written, was not signed by the advocate who witnessed the same, and none of the witnesses was related to the deceased. In that regard, the Will contravened the Local (Customary Law Declaration) Order No. 4 of 1963, GN. No. 436 of 1963 (Local Customary Declaration Order). Moreover, the said Will did not specifically appoint the plaintiff to be the executor/administrator of the deceased estate as the name appears only on the cover page. Lastly, the said Will redistributed the properties which had already been distributed by the deceased except for the house situate at Shah Tours which the plaintiff claims had been bequeathed to her. On the 2nd issue Mr. Mwanganyi submitted, between the Petitioner and the Caveator, the latter is most eligible person to administer the deceased estate. The learned advocate did not submit on the third issue. After the foregoing summary, I will now wish to discuss the substance of the suit in relation to the framed issues raised. Starting with the 1st issue; Whether the Will dated 27th March, Page 16 of 25 2017 was valid. Section 2 of the Probate and Administration of Estates Act CAP 352 R.E. 2019 defines a Will as follows: - "Will means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death." Through a Will, a testator can express his desires and such desires have to be complied with. The position has been affirmed in the cases of Celestina Paulo Vs. Mohamed Husein [19831 T.L.R 291 and Julias Petro Vs. Cosmas Raphael fl 9831 T.L.R 346. The word 'valid' has been defined in the Black's law Dictionary 8th edition to mean legally sufficient or binding. A Will becomes valid as long as the maker complies with the requirement under Rule 5 of the 3rd Schedule of the Local Customary Declaration Order. This Rule provides that a Will has to be made voluntarily by the testator as to how he would wish his estate be administered upon his passing away. The process in that regard includes special witnesses to be present in the intended Will. In the matter at hand, the defendant challenges the validity of the deceased Will dated 27th March, 2017. From the outset, Page 17 of 25 I join hands with the caveator that the Will dated 27th March, 2017 which was admitted in this Court as Exhibit "P2" is questionable and the toll owing are my reasons: - First, the first page which is the cover page reads; "HUU NI WOSIA WA MWISHO WA BWANA ANDWENISIA ABERNEGO TILYA WA SLP. MOSHI-TAN1ANIA MSIMAMIZI WA MIRATHI AUYETEULIWA ROSE ANDWEDISIA TILYA TAREHE 27TH MARCH 2017" From the 2nd page through the 3rd page is where the deceased allegedly started to

distribute his properties. However, there is no single line or clause which specifically mentioned the plaintiff therein as the executor of the deceased Will. Now the question is, where did the Author of the Will get information that the plaintiff had been appointed the Executrix so as to be acknowledged on the front cover page. Section 24(1) of the Probate and Administration of Estate Act (supra) reads; Page 18 of 25 “24. Grant of probate (I) Probate may be granted only to an executor appointed by the Will,” It was upon the deceased to mention specifically within the clauses forming the Will that, he had appointed the plaintiff the executor. There is yet a glaring feature in the Will that the maker (deceased) did not sign the pages to the Will apart from the third page. In the firm view of this court, given such a situation this created room for pages to be inserted that which were not made by the deceased; hence the authenticity of the said Will left wanting. Secondly; on the witnesses who signed the said Will. According to section 19 of the Local Customary Declaration Order, a written Will should be as follows: - “79, Wosia ulioandikwa ushuhudiwe na mashahidi wanaojua kusoma na kuandika-yaani mashahidi wasipungue wawili (mmoja wa ukoo na mmoja mfu bakij ikiwa mwenye wosia anajua kusoma na kuandika, na wasipungue wanne (wawili wa ukoo na wawili watu bakij-ikiwa mwenyewe hajui kusoma na kuandika.” Page 19 of 25 From the Will produced in Court and the witness evidence indicate the testator knew how to read and write, thus, a minimum number of two witnesses was sufficient. The 1st witness Daudi Isaria Maro testified to be a close friend, however, the relationship between Hoise Gerald Mandara and the deceased is farfetched. It would seem was some kind of a distant cousin not very well known to the clan members. Evidence shows the deceased had siblings who could have been witnesses and other close related persons who would have been summoned as was done during the burial ceremony. Third, the said witnesses were not aware of the contents of the said Will which is contrary to the role of a witness. The witnesses’ main role in documents of this nature is to ascertain the contents stated in the document as the deceased’s will and last wishes. Further to ascertain the maker was of sound mind and was not under any undue influence when making the Will. This is important because by the time the Will takes effect the person who signed it, is no longer around to say whether or not the document that is being presented to the probate Court is really his or her Will. This is the time the Page 20 of 25 witnesses come into play to testify on what they heard and witnessed. The rationale behind having two witnesses of whom one of them or in a different scenario half of them be related to the testator is simple, to “safeguard against fraud” as Msumi, J. (as he then was) held in the persuasive case of John Naomoi Vs. Mohamed Ally Bofu M9981 T.LR 63. However, this is not the case in the instant matter as the witnesses had no idea whatsoever of the contents embodied in the Will thus, they cannot for sure declare whether what is written was truly the deceased’s wishes. Given such state of affairs there was no safeguard against fraud in regards to the said Will. Fourth; when cross examined, PW3, Daudi Isaria Maro stated; “On the signature, I wrote my name with a pen. If it is typed then I do not know” It is to be kept in mind that, this is the plaintiffs witness who specifically states that he wrote his name and signed with a pen, but the Will admitted in evidence in Court shows the witness’s names were typed. This leaves a lot to be desired and can safely be stated the same could have been Page 21 of 25 adulterated or

alterations made therein, hence renders the Will invalid. Fifth; the Will read out by Advocate Minde was not sealed before she read it to the deceased family. Although she testified that the envelope was properly sealed and stored safely in her office, the evidence provided in this court including that of PW3 proved otherwise. Rule 114 of the Probate Rules, G.N No. 369 of 1963 (made under section 9 of the Probate and Administration of the Estate Act) provides for the Wills presented in the Court to be sealed in an envelope. Although the law is silent on how should the Will be kept in private offices, say Advocates office as in this matter, in banks, religious leaders etc, I am of the considered view that, the logic behind Rule 114 applies to all other places as was calculatedly designed; to avoid fraud or such Wilis to be tempered with. The fact that the Will in question was read out from a loose unsealed envelope places its authenticity to question. Lastly, it is not clear as to why PW2 decided to leave with the deceased Will after she read the same to the elan and family members. Although she stated that they did not want the Will, Page 22 o f 25 the caveator and his witnesses argue to the contrary that, she .left with it intending to sign and attest the same. The plaintiff's witness (PW3) had the same story. As though not enough, at the same time, the learned counsel left them with a copy of a sketch map which she purportedly stated was produced by the deceased in preparation of the Will, (t is therefore doubtful, that family members agreed to receive the sketch map but refused to receive the Will for no good reason. Generally, the witness's act was wanting and puts her testimony into question. The only explanation to this in the settled view of this court is that, the learned advocate left with the Will knowing it had procedural defects and this is why she never went back to present or hand over the said Will. She left the ball rolling to the plaintiff who was not present at the clan meeting nor did she know what had transpired. She was not in the position to either know whether the purported Will was sealed or not, and whether it had been signed and attested to. In the case of John Ngomoi Vs. Mohamed Ally Bofu (supra), the Court held inter-alia that: - (!) N/A Page 23 o f 25 (ii) Where a Will is surrounded by fraud, if is void. Based on the above analysis, the first issue is answered in the negative that, the deceased Will dated 27th March, 2017 is not valid worthy to be applied in the distribution of the deceased's estate nor to lay foundation of the appointment of the plaintiff as the executor. On the 2nd issue on whether the petitioner/plaintiff or the caveator/defendant should be appointed as the executor of the deceased W ill the answer is also in the negative. None of the two deserves to be granted the filed probate. Having declared the 2017 Wilt invalid, the petitioner's (plaintiff) automatic right to be the Executrix of the deceased estate evaporates. Likewise, the caveator cannot be appointed to execute the 2015 Will as he prayed. This is so because the said Will mentioned his father Chistopher A. Tilya (reported dead) as the executor, and since he is now deceased, the same cannot be easily executed. He cannot just simply assume such responsibility even if he would seem was suggesting the clan approved him. In light of lack of sufficient proof and probate procedures dully followed, the defendant's prayer has no legs to stand. Page 24 o f 25 On the last issue as to the rights entitled to the parties, this Court is of the view any entitled party or parties to apply to be executor(s)/or administrator(s) upon nomination and proper probate procedures. In the circumstances, the caveat filed by the defendant has merit and the same is accordingly sustained. This being a probate matter

involving parties dully and closely related, I grant no order to costs. B. R. MUTUNGI JUDGE 1/04/2022 w i this day of 1/04/2022 in presence of the Plaintiff/Petitioner, Defendant/ Caveator, Mr. Charles Mwangani for the Defendant/Caveator and holding brief for Mr. Kilasara for the Plaintiff/Petitioner. B. R. MUTUNGI JUDGE 1/04/2022 RIGHT OF APPEAL EXPLAINED. Page 25 o f 25

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