

TANZANIA / JUDGMENT

in the matter of application for letters of administration by jane vitus kapinga and in the matter of caveat by wolfgang michael nyange 2024 tzhc 78 19 january 2024

COURT
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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA MOSHI DISTRICT REGISTRY AT MOSHI PROBATE AND ADMINISTRATION CAUSE NO. 01 OF 2022 IN THE MATTER OF THE ESTATE OF THE LATE MICHAEL THEODOR NYANGE DECEASED AND IN THE MATTER OF APPLICATION FOR LETTERS OF ADMINISTRATION BY JANE VITUS KAPINGA PETITIONER AND IN THE MATTER OF CAVEAT BY WOLFGANG MICHAEL NYANGE CAVEATOR

JUDGMENT

27/11/2023 & 19/01/2024 SIMFUKWE, J. The deceased in this matter, Michael Theodor Nyange prior to his demise prepared his Will dated 01st June 2020 which was witnessed by two 1 witnesses: one Fidelis Aloyce Kessy the nephew of the deceased and Rogathy Venance Kundy a friend of the deceased. The said Will was made before the learned counsel Ms Rebecka Peter. In the said will, the deceased appointed Mrs Jane Vitus Kapinga his daughter to be executrix of the Will. Thereafter, on 13/01/2022 at Kileuo village in Moshi district in Kilimanjaro region, Mr. Michael Theodor Nyange departed this life. Then, the instant petition was filed by the petitioner praying to be appointed to administer the estate of her late father. Upon citation being issued, the Caveator Wolfgang Michael Nyange the first son of the deceased filed his caveat on 19/04/2022. In his affidavit in support of his caveat, the caveator deponed inter alia that prior to his death his father made a written Will which lacks legal validity. He objected the appointment of the petitioner on the following reasons:

- a) That, at the time the purported Will was made the deceased was an old man and sick, resulting in loss of memory.
- b) That, when the purported Will was read at the funeral (Matanga) it was discovered that dates do differ at the jurat and attestation clause.

- c) That, the purported Will contravene GN 436 of 1963. 2
- d) That, the purported Will did appoint the petitioner to administer the deceased's estates which is contrary to what the clan had recommended, the clan meeting recommended the caveator to be administrator of the estate of the deceased.
- e) That, the purported Will did not recognize the one and only legal wife of the deceased despite properties of the deceased being matrimonial properties.
- f) That, the purported Will did not recognize other children of the deceased apart from the petitioner, in the distribution.
- g) That, the purported Will dispose other properties which doesn't belong to the deceased and that other properties are not properly described.
- h) That, the circumstances of making the Will is tainted with illegalities and irregularities on its face. Based on the fact that the petition is contentious, it was conducted under the normal procedures of civil suits pursuant to section 52 (b) of the Probate and Administration of Estates Act, Cap 352 R.E 2002. Whereas the following issues were framed prior to the hearing of the matter:
 - a) Whether the Will is valid. 3
 - b) The remedies which the parties are entitled to. The plaintiff (petitioner) called four witnesses while the defendant (caveator) called three witnesses. PW1 Rogati Venance Kundi testified among other things that, on May or June 2020 the deceased went at his workplace and told him that he was waiting for him. PW1 finished his work and went at the place where the deceased had parked his vehicle. Then, they went together to the lawyers near the Lutheran Church which is near the Bus Stand. The deceased gave PW1 a paper and required him to read and sign on it. After reading the said paper, PW1 knew that it was a Will. In the said Will, the deceased had stated inter alia that his children and grandchildren were assaulting and insulting him. PW1 testified further that, in the said Will the business place was given to Jane the daughter of the deceased. Another child of the deceased was mentioned in the Will but PW1 could not remember his name. He stated further that, the nephew of the deceased went there at the lawyers and found them. PW1 signed the Will in the presence of the deceased, his nephew and the lawyer. PW1 identified the Will which he signed. He stated further that he asked the deceased why he had decided to prepare his Will, the deceased replied 4 that he did so due to misunderstanding with his children which could cause his death. He recalled that, the deceased once called him at Uchira primary court where he had a case with his children. PW1 could not remember if the said Will had mentioned the administrator/executor of the Will. PW2 Mr. Fidelis Aloys Kessy stated inter alia that he knew the deceased Michael Theodor Nyange very well as the brother of his mother and primary school teacher. He informed this court that recently, the relationship of the deceased with his family was not good. The deceased was married to Philomena Kavishe through a Christian marriage as the only wife and they were blessed with nine children, two

of them passed away. PW2 identified Wolfgang one of the children of the deceased who was before the court. He listed the rest of the children of the deceased as Rosemary, Beatrice (deceased), Getrude, the twins Jane and James, Corona, Martha and Sophia (deceased). He narrated further that, during his life time, the deceased was mentally fit. That, on 01/06/2022 PW2 was called by the deceased who required him to go to see him at Moshi town. PW2 found his uncle at KKKT building first floor where he was in the company of one man who was introduced as Rogati. The deceased told 5 PW2 that he wanted to write a Will in order to make things clear due to what was going on at his family as there was a lot of misunderstandings with his children. That, Wolfgang had buried his daughter Sophia without informing him. That, Wolfgang used to insult the deceased and once he called him a gay. That, other children also used to insult, assault and pour water on him. PW2 stated further that, the deceased mentioned Corona, Rose and Getrude among the children who were mistreating him. The deceased said that all were done under the supervision of Wolfgang. PW2 testified how they witnessed the preparation of the Will which they eventually signed in the presence of the advocate. He explained that, in that Will the deceased stated that he was nullifying other Wills. That, he had seven children and several grandchildren but his estate should be inherited with only two of them as the rest used to insult and assault him. That, his executrix should be Jane Titus Kapinga who resides at Dar es salaam. PW2 stated further that, the deceased told him orally that he should be buried at the place where he used to park his motor vehicle at his homestead at Kirua Vunjo. That, the house at Kirua Vunjo, livestock and utensils should remain with his son James. That, the deceased said further that a business house at Kisomachi- Kirua Vunjo should remain 6 with Jane. He also said that his two bank accounts at NMB and another bank should be supervised by Jane. PW2 went on to state that the deceased also told him that his wife was sick and that in case he dies, PW2 should tell James his son to take care of his mother. That, after they had signed the will, it was sealed in an envelope. The deceased had been directed by the advocate that his Will could be kept at the court or at the church. He was warned not to keep it at home and make sure that he informed someone about the said Will so that when he dies, the said person would report at the church, so that the Will would be read. Thereafter, the deceased left with his Will in the envelope, while one copy of the Will remained at the advocate. After two weeks, PW2 received a phone call from his uncle informing him that he had taken his Will to the Roman Catholic Church, Karumeli Parish at Kirua Vunjo at Kileuo village. The deceased also told PW2 that the Padre should read over his Will at his burial ceremony after the burial. PW2 was of the view that the deceased opted to keep his Will at the church because he was a good Christian, all his children were baptized and contracted Christian marriages. Thereafter, life went on until on 09/01/2022 when the deceased called PW2 and required him to go there. PW2 went to the homestead of the 7 deceased. He was told that he was called because the deceased was threatened to be killed by his daughter Rose who had told him that she went there for a special mission. That, the said Rose went there with a coffin and there was a clan resolution which was chaired by Wolfgang. PW2 asked the deceased how could he help him? He said that he had not called him to help him, rather to inform him that the clan had decided that he should die. PW2

advised his uncle to leave his homestead so that he could settle his mind. They agreed that on 14/01/2022 the deceased should leave for Dar es Salaam. They communicated with Jane his daughter and booked an air ticket. They agreed to meet at the airport so that PW2 could take back his motor vehicle after checking in. On 13/01/2022 few minutes to 07:00 am, PW2 made a phone call to his uncle who blamed him that on 11/01/2022 he left without notice while he was asleep. At about 06:58 am the worker of his uncle one Kyara informed him through a phone call that his uncle had fallen from the bed and died. PW2 advised Kyara that he should lay his uncle on his back and find a motor vehicle. It was stated further by PW2 that, when his uncle was falling down Rose and Getrude were at home but they were not ready to offer any help. Kyara went to their other uncle Deo Herbert who took the deceased to 8 KCMC where it was confirmed that PW2's uncle was died. Next day on Saturday, PW2 went to the funeral and found three of the children of the deceased demolishing a parking shade. When he asked them why they were doing so, they said that they were directed to do so. After few minutes the son of the deceased arrived. He went to greet his mother. Then, a misunderstanding arose between Getrude, James and Rose. They were insulting each other. Seeing that the misunderstanding was intensifying, PW2 advised James that they should leave. PW2 stayed with James up to midnight and took him back. Next morning, James told PW2 that he wanted to build a tomb of his father, he directed him that his father had directed that he should be buried at the parking place. On the burial day, PW2 told the Padre that he should read the Will at the burial but it was not read. It was agreed by the family members that the said Will should be read next day at the clan meeting. Next day the Will was not read and the Padre left. After their names had been listed, they started distributing the properties of the deceased. All of them were aware of the Will but Wolfgang said that they will read it on the day they would want to do so. PW2 left them distributing the farm because his aim was to read the Will and not distribution of the farm. 9 Next day, Jane Kapinga required PW2 to go back as people were complaining that the Padre was bribed so that he could not read over the Will. The Will was read over on the third day but PW2 was chased away and the Will was read over by another person not the Padre. The person who read over the Will was the advocate who was appearing for the defendant in this case (Mr. Stewart Shuma). PW2 clarified that, although he stood a distance of about 50 paces, he managed to identify the person who was reading the Will and heard what was being read. Some parts of the Will were not read. PW2 gave an example of the words of the Will that some of the children should not inherit the estate of the deceased because they used to assault the deceased. James made follow up of the death certificate and the process of instituting a probate cause began. PW2 identified the Will he was testifying about PW3 Ms Rebecka Peter's testimony was that she is an advocate with roll number 1926 with a working experience of about thirteen years. She informed this court that she prepared a Will of Mzee Michael Nyange who is deceased. That, the deceased went at her office and told her that he had children and intended to prepare a Will. They had conversation for a 10 while, PW3 directed the deceased that he should have two witnesses who should not be among heirs. PW3 was of the opinion that the deceased went to her while of sound mind. She directed him to propose the executor of his Will, list his properties and that if he had intended to

exclude some of the heirs, to state the reasons for doing so. She said that the Will was prepared on another day as on the first day she just gave directives to the deceased and he had no witnesses. PW3 testified further that, on the material day, the deceased went with two men, one of them was introduced as Fide the son of his sister. PW3 prepared the said Will pursuant to the information which the deceased had given her and printed three copies and gave them to the deceased who said that he wanted to take one copy to the Padre at his Parish. PW3 informed this court that a valid Will must have a name of the person who is making that Will, the executor of the Will, place of burial, list of the properties of the deceased, distribution of the said properties, signature and verification. She confirmed that she was sure that those requirements of the Will were met as it was signed by three people. PW3 signed each copy of the Will and wrote her initials on each page of the Will. Then, she sealed each copy in an envelope and remained with one 11 copy. She prayed to tender the said copy as exhibit. It was admitted as exhibit P1. PW3 continued to state that the Will was prepared and signed on 01/06/2020. That, on the second page of the Will the date is written 08/06/2020 as human error as she noted it before the court. According to the Will the executrix is Mrs Jane Vitus Kapinga. That, the deceased did not mention the bank accounts, he just mentioned the names of the banks. That, before excluding some of the heirs, the deceased narrated to her in details why he had decided to exclude them. PW3 could not write everything which was narrated to her, she summarized. She believed that the said Will could not be tempered with as it was kept in the strong room. PW3 was informed about the demise of the deceased by the person called Fide. She attended the burial ceremony as she suspected that they could require the Will. On the burial day, they said that the family meeting could be conducted next day. Thus, PW3 had to go back next day. They said that they intended to meet as a clan first. She met Fide, Jane the daughter of the deceased and other people. She was waiting if they could ask if someone had a Will. They said that the Will would be read over on another date. PW3 respected their decision and left with the Will. As the deceased had informed PW3 that he would take one copy to the Padre, she believed 12 that the said Padre would take that Will to the family, which would sound good compared to her. PW4 Padre Gregory Raphael Bahati started his testimony by producing his identity card in proof that he was a Padre. The certified copy of the said identity card was admitted as exhibit P2. He continued to state that, their responsibility in respect of a Will is to receive and keep it until when it will be required. That, they also give guidance on how to prepare a Will. He explained that a Will should be kept at a safe place where it cannot be opened and it should not be reported anywhere. He made it clear that a Will is kept by the head of the Parish, thus the Father. PW4 informed this court that he knew Michael Theodor Nyange as a member of Carmel Parish where he was serving. He was baptized and received all the sacraments and used to participate in other activities of the church. On June 2020, the deceased Michael Theodor Nyange gave PW4 a Will which he directed that it should be read over to the family when he passes away. PW4 said that the deceased was mentally fit and told PW4 that he decided to take the Will to him as he believed that he could keep it safely. The said Will was closed in an envelope. PW4 was alone when he was given that Will. PW4 wrote on it "Wosia wa Michael 13 Theodor Nyange" so that it could be identified easily in case the

office was succeeded to another person. It was testified further that PW4 was informed about the demise of Michael Theodor Nyange by the head of the local/cell church (Jumuiya). The Jumuiya leader took the burial form which they were required to fill. Thereafter, they attended the burial ceremony and PW4 lead the burial service. Then, the biography of the deceased was read by his son James. James apologized for the misunderstandings which took place in their family. They shook hands with his brother. After they had finished the burial service, PW4 informed the family that the deceased had given him a Will on instruction that it should be read over. There was a tension, thus it was directed that the said Will should be read over at the family meeting. PW4 left with the said Will and kept it. Next day, PW4 was informed that he could take that Will to the family. He found the family members at the meeting. He asked them who should read that Will, they introduced to PW4 a lawyer who read over that Will. Thus, PW4 handed over the Will to the said lawyer. The lawyer read over the Will to the family. Moreover, PW4 advised the family to enhance peace and unity amongst them. He identified the Will which he was testifying about. 14 That was the end of the plaintiff's case. Three witnesses testified on part of the defendant. DW1 Wolfgang Michael Nyange stated that he was before the court to object the Will which was left by their deceased father on behalf of other heirs especially their mother. He notified this court that he is the first born of the deceased Michael Nyange and a chairperson of Moshi clan. He said that the Will which he was objecting was admitted in this court as exhibit P1. The reason behind his objection was that the said Will did not recognize their mother Philomena Nyange who was before the court. It was asserted by DW1 that their mother contracted a Christian marriage with his father in 1960. It was contended that, the said Will did not mention the names of the children and grandchildren of the deceased. Another anomaly of the impugned Will was stated to be that it was alleged that the seven children of the deceased were harassing the deceased. Surprisingly, two of the seven children were bequeathed with the properties of the deceased while they were among the seven children who were alleged to have harassed the deceased. Literally, he said that the two children were not among the seven children. Otherwise, the Will was said to be contradictory. 15 Moreover, DW1 averred that there is a clan farm in which there are people who reside in it and cultivate it and the same was distributed to James Nyange while there are procedures of distributing clan land. He averred further that there are clan members who have been buried in the said land. Thus, it my cause chaos in the family as they found it causing misunderstanding in the family. Furthermore, DW1 alleged that some of the properties of the deceased were not listed, the bank accounts were not indicated together with the amount found in the said accounts. In addition, it was stated that the deceased was cohabiting with another woman at another place where they had business. Thus, it is not certain which business place was given to Jane Kapinga. Also, DW1 noted that the date which the Will was signed against that of the advocate also raises some doubts as their father was very smart. He sought guidance of this court as their mother has been ordered to leave as no property was left to her. He emphasized that their aim is unity and peace in the family. That, their mother should get her rights as she is sick and bed ridden. DW1 prayed that the Will be nullified as it will set bad precedent in the family. 16 DW2 Ms Imani Michael

Nyange supported evidence of DW1 that he was objecting the Will which was left by her biological father Michael Nyange. She said that their mother Philomena was alive and sick for seven years. She explained that she was the one who was taking care of their mother after being attacked by stroke. That, he has been staying there even when their father was alive. Thus, DW2 was taking care of both of them. She explained further that they were living happily just like other families. Common misunderstandings used to happen and they used to resolve them and proceed. Regarding the impugned Will, DW2 contended that it had many weaknesses. First, she said that it did not acknowledge their mother Filomena Michael Nyange. Secondly, the deceased recorded in the Will that he had seven children but only two children were bequeathed with the estate of the deceased. Possibly the deceased had more than seven children as he had alleged that all seven children should not inherit his properties as they used to insult him. If the two children were among the seven children, why should they inherit while others were left? Concerning the house indicated in the Will as a business house, DW2 said that what they knew was that their father had another woman whom he 17 had given a house for conducting business. Thus, the Will is not specific, which business house? Regarding the farm, DW2 said that the deceased stated it clearly that it was a clan farm and it had more than one house. She wondered that the said farm was given to one person without consent of that clan. She alleged that there were other relatives of their father who had built houses and had graves in that farm. She was of the opinion that, it will be unfair to them and a contradiction. In respect of utensils, DW2 said that all children had contributed to buy the same. Their mother who was the legitimate wife of their father had nothing in the contribution. She complained that the said Will has brought misunderstanding in the family as some of the children are no longer taking care of their mother. She prayed this court to help them to bring peace in the family. She was of the view that, if the Will is corrected, any person can be appointed to administer the estate of their deceased father. DW3 Mr. Thadeus Kamili Moshi narrated that when the Will was read to them as a clan, they found that it was not composed well. He notified the court that he was testifying as a deputy clan chairperson. He noted the weaknesses of the said Will to be that, it did not acknowledge the wife of the deceased. Second, only two children were acknowledged while the 18 deceased had seven children. Even their names were not mentioned. Third, the farm was distributed to two children while it was a clan farm. That, the farm had many relatives and some of them are died and were buried in that farm. DW3 identified another weakness of the Will as failure to distribute the estate to the wife of the deceased while the deceased had contracted a Christian marriage. He insisted that, the wife of the deceased was not given anything while she acquired those properties with her husband. It was stated further that the will was signed on different dates while they were together with the deceased. From the date when the Will was read to date, there is no harmony in the family. That, the family has disintegrated and some of the complaints were referred to the clan leadership. For the sake of resolving the dispute, they appointed Wolfgang Michael to settle the matter. DW3 introduced himself as the uncle of the children of the deceased. He concluded that any person can be a right person to administer this probate provided the Will is corrected. Having considered evidence of both parties, I now

proceed to determine the framed issues. 19 The first issue is Whether the Will is valid.

Section 2 of the Probate and Administration of Estates Act, Cap 352 R.E 2002 defines a Will as the legal declaration of the intentions of a testator with respect to his property which he desires to be carried into effect after his death. Section 89 of the Probate and Administration of Estates Act, (supra) provides that: “89 (1) In the administration of the estate of a deceased person by virtue of an order or direction under Part IX of this Act any testamentary disposition purporting to dispose of any part of that estate shall be recognised as a valid will, if it complies with the following requirements–

- (a) where the estates are to be administered according to customary law if either–
 - (i) the disposition is recognised as valid by such customary law; or (ii) the disposition is valid in accordance with the provisions of an order of the Minister, whereby it is declared any testamentary disposition, made by the deceased or by any member of a class of persons which includes the deceased and made in accordance with the provisions of the Indian Succession Act, 1865, relating to wills, 20 and shall to the extent and subject to the limitations specified in the order be recognised as valid;
- (b) where the estate is to be administered according to the law applicable to the estates of persons professing the Christian religion, if the disposition is made in accordance with the provisions of the Indian Succession Act, 1865, relating to wills; and
- (c) where the estate is to be administered according to Islamic law, if the disposition is recognised as valid by that law.

- (2) A testamentary disposition to which this section applies shall not be acted on until it has been declared to be a valid will by the court exercising jurisdiction over the estate.”

Emphasis mine Section 46 of the Indian Succession Act No. X of 1865 provides that: “Every person of sound mind and not a minor may dispose of his property by Will.” Section 50 of the same Act provides that: 21 “Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at Sea, must execute his Will according to the following rules: First- The Testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction. Second- The signature or mark of the testator or the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will. Third – The Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will, or have seen some other person sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.” Thus, for a Will to be valid it must meet the above prescribed requirements. 22 The Caveator in this matter was of the opinion that the Will attached to the instant petition is invalid due to the following weaknesses:

- a) That, at the time the purported Will was made the deceased was an old man and sick, resulting in loss of memory.
- b) That, when the purported Will was read at the funeral (Matanga) it was discovered that dates do differ at the jurat and attestation clause.
- c) That, the purported Will contravene GN 436 of 1963.
- d) That, the purported Will did appoint the petitioner to administer the deceased's estates which is contrary to what the clan had recommended, the clan meeting recommended the caveator to be administrator of the estate of the deceased.
- e) That, the purported Will did not recognize the one and only legal wife of the deceased despite properties of the deceased being matrimonial properties.
- f) That, the purported Will did not recognize other children of the deceased apart from the petitioner, in the distribution.
- g) That, the purported Will dispose other properties which doesn't belong to the deceased and that other properties are not properly described. 23
- h) That, the circumstances of making of the Will is tainted with illegalities and irregularities on its face. This court finds that weaknesses described in clause b), e) and g) above have substance. Guided by the cited provisions of the law, I am of considered opinion that the impugned Will does not qualify to be acted upon as provided under section 89 (2) of the Probate and Administration of Estates Act (supra). The deceased did not state in his Will the reasons for not including his only wife in the said Will as beneficiary. As a general rule when a man dies intestate and leaves a widow, the widow is entitled to one third of his property. Section 27 of the Indian Succession Act (supra) is relevant. Moreover, the fact that there are two dates in the purported Will is not disputed. Also, the Will show that the clan farm and utensils were bequeathed to James the son of the deceased. I agree with witnesses of the Caveator that a clan farm cannot be part of the estate of the deceased. Furthermore, it is unbelievable that utensils can be distributed to the son while his mother is still alive. Apart from that, the bank accounts and the amount which were in the said accounts of the deceased were not mentioned in the purported Will. Section 76 of the Indian Succession Act (supra) provides that: 24 "A Will or bequest not expressive of any definite intention is void for uncertainty." It is on the basis of the above noted weaknesses that the purported Will in this matter is rendered invalid. In the circumstances, it is assumed that the deceased died intestate. Hence, this court will grant letters of administration of the estates of the deceased and not probate. The next issue is what relief(s) are the parties entitled to? Since the Will which appointed the petitioner as executrix is declared as invalid, it follows that the executor as well lacks the blessing of being granted the probate. However, it is on record that the caveator and other beneficiaries informed this court that they were objecting the Will and not the Petitioner. The next question is, is the petitioner eligible to be appointed as administratrix of the estates of her deceased father? In the case of Sekunda Mbwanbo vs

Rose Ramadhani [2004] TLR 439 it was held that: “Furthermore, it must by now be very obvious to all, that such an administrator must be a person who is very close to the deceased and can therefore easily identify the properties of the deceased. He must also have the confidence of all the beneficiaries or dependants of the deceased. Such a person may be the widow or the 25 widows, the parent or child of the deceased or any other close relatives of the deceased.” Emphasis added In this matter, among the eligible persons to be granted letters of administration of the estates of the deceased is the Petitioner and the Caveator. Therefore, for interest of justice the Caveator should be added as administrator of the estates of the deceased on the reason that he is the elder son of the deceased and he was appointed by the clan to that effect. I therefore grant letters of administration of the estates of the late Michael Theodor Nyange to the Petitioner Jane Vitus Kapinga and the Caveator Wolfgang Michael Nyange. No order as costs. It is so ordered. Dated and delivered at Moshi this 19th day of January 2024. X S. H. SIMFUKWE JUDGE Signed by: S. H. SIMFUKWE
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