IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KAIRO, J.A. And ISSA, J.A.)

CIVIL APPEAL NO. 482 OF 2021

MAGDALENA ANTHONY SANGA .... APPELLANT

VERSUS

THERESIA DOMINICUS TWEVE... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Mbeya)

(Mongella, J.)

dated the 5th day of August, 2021
in
Probate and Administration Cause No. 4 of 2016

....

JUDGMENT OF THE COURT

3rd & 11th December, 2024

MWANDAMBO, J.A.:

The appellant Magdalena Anthony Sanga was aggrieved by the decision of the High Court sitting at Mbeya in Probate Cause No. 4 of 2016 invalidating the will made by one Dominicus Majibu Tweve appointing her as his executrix to administer the will upon his death and effectively dismissing the petition for the grant of the probate. She is appealing that decision upon six-point memorandum of appeal.

The facts from which the appeal has arisen reveal the following: On 10 August 2005, Dominicus Majibu Tweve (the testator) executed a will appointing Magdalena Sanga, the appellant, as his executrix of the

will upon death to administer his estate in the manner prescribed therein. The testator died on 9 August 2012. It was common cause that a few days after the deceased's death, Mr. Mika Thadayo Mbise, learned advocate who had been entrusted with the custody of the will, read the contents thereof to the deceased's clan members, the widow included. Subsequently, the appellant petitioned for the grant of the probate before the Urban Primary Court which granted it. It was equally common ground that, following the grant, the appellant distributed the properties to the beneficiaries named in the will but the respondent objected to the distribution.

On appeal, the District Court of Mbeya nullified the proceedings before the primary for want of jurisdiction in Probate Appeal No. 6 of 2013 which culminated into a petition before the High Court. Subsequently, the executrix petitioned for the grant of probate in Probate and Administration Cause No. 4 of 2016 before the High Court sitting at Mbeya. Not surprisingly, the petition was met by a caveat filed by the testator's widow; Theresia Dominicus Tweve; the respondent herein. The grounds upon which the caveator challenged the grant of the probate to the appellant are contained in her affidavit lodged in the High Court on 16 June 2020 namely; (1) the will was void for being

attested by a person who was not a relative of the testator; (2) the executrix was not a trustful person; (3) the testator bequeathed to his sister properties jointly acquired with the caveator including the matrimonial home at Iyela; (4) the testator was, at the time of making the will, of unsound mind.

Not surprisingly, the executrix resisted the caveat by filing a counter affidavit disputing all grounds in the affidavit. As the grant of the probate became contentious, the matter proceeded as a suit in terms of section 59 of the Probate and Administration of Estates Act (the Act). The High Court framed three issues for the determination of the caveat that is, (1) validity of the annexed will; (2) the person to be appointed as administrator of the deceased's estate and; (3) reliefs the parties were entitled to. It is striking that, the 2nd issue was framed on the assumption that the High Court had power to appoint an administrator upon a finding that the will was invalid and so the deceased must have died intestate. We shall come to that later in the course of this judgment.

After hearing evidence from three witnesses for the appellant and two from the respondent's side, the court found it was proved that the will was invalid on account of wanting attestation by one of the

witnesses, who was not a relative of the deceased and bequeathing matrimonial properties jointly acquired with the respondent to the testator's sister. Despite its finding that the caveator's case on the alleged forged signature as unproven and that there was no evidence proving that the testator was of unsound mind at the time of executing the will, the High Court observed that the fact that the testator bequeathed the matrimonial home to her sister rendering his wife homeless proved that he was not in the right state of mind when making the will. Having so found, the trial court nullified the will holding that the deceased should be taken to have died intestate and thus his estate was to be administered as such in accordance with Indian Succession Act as the law applicable considering that he professed Christian faith.

Ordinarily, after nullifying the will, the trial court ought to have held the caveat proved and proceeded to dismiss the petition for the grant of probate to the appellant. Instead, it went ahead and determined the 2nd issue on who was the suitable person to be appointed as administrator of the deceased's estate. In the end, it appointed both the appellant and respondent as joint administratrices of the deceased's estate with a direction to administer it in accordance with Indian Succession Act as alluded to earlier on.

At the hearing of the appeal, Mr. Luka Ngogo, learned advocate appeared for the appellant holding the brief of Ms. Mgaya with instructions to proceed. On the respondent's side, Ms. Joyce Kasebwa and Mr. Daniel Muya, both learned advocates appeared to resist the appeal. As the appellant's advocate had already lodged her written submissions ahead of the hearing, Mr. Ngogo urged us to consider them along with the oral arguments he made before us. The learned counsel focused his oral submissions on the 1st ground in which the appellant faults the trial court for nullifying the deceased's will without justifiable grounds. Counsel urged that the three grounds upon which the High Court relied in nullifying the will were not sufficient to invalidate it.

To start with, it was argued that out of three grounds on which the trial court predicated its finding that the will was invalid namely; attestation of the will by Jonas Kalambo Kyando (the first witness) who was not a relative of the deceased; and, inclusion in the will properties jointly owned by the respondent and the testator as matrimonial assets; the matrimonial home at Iyela included. Besides, the record also shows that, even though the learned trial judge found no evidence to support the claim on insanity, drunkenness or illness, she took the view that the in bequeathing the matrimonial home to his sisters rendering his wife

and children homeless cast doubt on his thinking rationally at the material time. She thus concluded that the testator was not in the right state of mind when executing the will.

We note that Mr. Ngogo's oral submissions were not strictly a clarification of the written submissions he had adopted but an addition thereto but all the same crucial to the determination of the appeal.

In relation to the attestation of the testator's will by nonrelatives, the substance of the appellant's submission was that the finding of the High Court was erroneous having been a result of subjective treatment of the evidence and misapprehension of it and not an objective evaluation of the evidence as a whole. In doing so, he argued, the High Court shifted the burden of proof from the respondent to the appellant who had, through PW1, PW2 and PW3 sufficiently proved that the first witness was the testator's cousin brother. At any rate, counsel stressed that, if the trial judge was minded to disbelieve PW1 and PW2 who had interest to serve there is no reason for not considering PW3's evidence which was independent unlike CW1 and CW2 who too had interest to serve.

Regarding inclusion of jointly owned properties in matrimonial assets in the will, the learned advocate criticized the High Court for

concluding as it did that the respondent had ownership in the properties the testator bequeathed to the person named in the will simply because they were matrimonial properties without regard to the dictates of the law. Elaborating, Mr. Ngogo argued that, the issue whether or not a property is a matrimonial property is only relevant in matrimonial proceedings and not in probate proceedings as it were in this appeal. Counsel urged that, whereas section 59 (1) of the Law of Marriage Act (the LMA) protects a spouse's interest in a matrimonial asset from disposition without the consent of the other spouse, it does not extend to prohibiting a spouse from bequeathing such property. It was Mr. Ngogo's view that, mere marriage does not vest the other spouse with property of the other considering the presumption of separate ownership of properties by spouses under section 58 of the LMA and registration of property in a name of a spouse to be his exclusive property. In the circumstances, counsel stressed that the testator had right to bequeath the property at Iyela to the persons named in the will.

Finally, counsel argued that the claim that the testator distributed properties to the beneficiaries in the will in disregard of her shares in such properties was misconceived because no evidence was led to prove

how she acquired those parties regardless of her being sent to pursue hotel management course by the testator.

Responding to a question from the bench, counsel was emphatic that, at any rate, the court misdirected itself in appointing the respondent and appellant as administratricies of the testator's estate upon invalidating the will. According to him to which the respondent's advocates subscribed, the appropriate order should have been to dismiss the petition for probate and direct interested parties to petition for letters of administration according to law. With the foregoing, counsel implored the Court to find merit in the appeal and allow it.

On the adversary side, Mr. Muya addressed the court resisting the appeal on the basis of the written submissions in reply and brief oral arguments. In his oral address, Mr. Muya readily conceded erroneous trial court's finding on the wanting attestation by a nonrelative and argued that it was not supported by evidence and so it should be reversed. All the same, the learned advocate contended that, the attestation was in any event wanting for violating the dictates of the Indian Succession Act which was the law applicable to the testator who prophesied Christianity. According to the learned advocate, contrary to the said Act, the evidence at page 138 and 139 of the record shows that

the will was not attested by the two witnesses at the same time which was sufficient to invalidate it. To that end, counsel invited the Court to exercise its revisional power vested in it by section 4 (2) of the Appellate Jurisdiction Act (the AJA) by nullifying the will which will result in an order dismissing the petition for the grant of probate.

On the inclusion of the matrimonial asset in the will and disregard of the respondent's shares in the other properties, Mr. Muya conceded as much that the trial court went astray in its finding resulting in the nullification of the will.

Since the appeal was largely conceded except on the issue revolving around attestation, Mr. Ngogo was brief in his address in rebuttal. He invited the Court to take note that there was no contest in the manner the witnesses appended their signatures in witness of the will and thus the point raised by the respondent's counsel based on the alleged violation of the Indian Succession Act was misconceived. This is so, he argued, there was no evidence proving that the witnesses signed the will separately. In the premises, he did not see any justification for invalidating the will and invoking the revisional power in the manner urged by his learned colleague.

Having examined and heard rival arguments from counsel for and against the appeal, we wish to preface our judgment with one remark regarding the trial court's order appointing the appellant and respondent as joint administratrices of the deceased's estate in accordance with the Indian Succession Act. We note that the court did so addressing the 2nd issue it had framed before the commencement of the hearing. Be it as it may, that issue was uncalled for in the circumstances of the case. As conceded by both counsel, the appropriate order upon the court nullifying the will would have been dismissal of the petition for the grant of the probate to the appellant and directing interested parties to pursue the matter in accordance with the law. The appointment of the appellant and respondent as joint administratrices of the deceased's estate was highly irregular as it was not backed up by any law. Neither did the High Court have power to do so upon upholding the caveat.

It is instructive that, although the appellant's memorandum had six grounds, the learned counsel focused his address on the 1st ground faulting the trial court for nullifying the will without justifiable grounds. We think the learned counsel's approach is proper considering that the rest of the grounds are dependent on the determination of the 1st ground.

We have found apposite beginning our discussion by reiterating what we said in **Allen Rutatekururwa Rugazia v. Parfects Ruteganya** [2024] TZCA 530, TANZLII which is directly relevant to the appeal. The Court stated:

> " ... *In a petition for probate, the court is concerned with the validity of the will as annexed to the petition. The questions which normally come up are whether or not the will has been properly executed; whether or not the testator had the capacity to make the will; in the case where the testator has disabilities like blindness, deafness or illiteracy, whether or not the contents of the will were made knowledgeable to him by reading over, etc and he had granted his approval; whether there was undue influence or not; whether there was forgery and fraud or not; and whether the will has been revoked or not. If the will passes all the tests enumerated above, it is taken to be proved, and the court will grant the executor the power to administer the will...*"

Arising from the above, a will is presumed to be valid unless invalidated by the court on legally acceptable grounds. It is also significant that, the onus to prove that the will is invalid in its form and substance is on a party who alleges so, on balance of probability. It will

be recalled that, Mr. Muya conceded that the trial court's finding on the substance of the will in relation to inclusion of assets claimed to be jointly acquired as matrimonial as well as other properties allegedly jointly acquired by the deceased and respondent which include the three hotels; Nkwenzulu 1, 2 and 3. With that concession, we need not belabor the point any further. We only need to state that the determination whether such properties were indeed matrimonial or not could only be determined in matrimonial proceedings as urged by Mr. Ngogo. The same applies to other properties in which the respondent allegedly had shares. In the absence of evidence on either of the properties coupled with the presumption of ownership of separate property by spouse under section 58 (1) and 60 of the LMA, we agree with the learned counsel that the trial court strayed into an error in invalidating the deceased's will on that ground. It follows thus that, the trial court's reasoning that the testator was not in the right state of mind when making the will was, with respect, not only erroneous but also not backed by any evidence.

On the other hand, we also agree with the learned counsel that invalidation of the will on account of irregular attestation by non-relatives was a result of a subjective evaluation of the evidence on

record characterized by picking some pieces of evidence from PW1 and PW2 on whether or not Jonas Kalambo Kyando was a relative of the deceased. Surprisingly, the trial court chose to disbelieve PW1 and PW2 for being contradictory but believed CW1 who claimed that Jonas Kalambo Kyando was not the deceased's relative. In the premises, as rightly submitted by Mr. Ngogo, since PW1 and PW2 on the one hand and CW1 on the other hand had interest to serve in the outcome, there is no reason why the trial court disregarded PW3 who was an independent witness. Without further ado, we set aside that finding with the effect that, on the evidence, it was sufficiently proved that the will was properly attested by witnesses who were competent to do so. That now takes us to the issue raised by the respondent's learned advocate.

Both counsel are agreeable on the manner of witnessing a will for persons to whom the Indian Succession Act applies, the testator included. The only dispute is whether, as contended by Mr. Muya, the will could in any event be vitiated on the ground that both witnesses did not sign at the same time. With respect, we are unable to find purchase in the argument. PW3 who prepared the testator's Will told the trial court that, after two months of preparing the will, he handed over a final draft to the testator for signature who took it to the witnesses; a

catholic priest and his cousin, one Jonas Kalambo Kyando for their signatures before returning the signed copy for safe custody. This witness was not controverted in cross-examination. Accordingly, in the absence of any evidence rebutting the presumption that the will which was regular and complete on the face of it, the onus to prove otherwise lied in the person alleging the contrary. Apart from the mere assertion from Mr. Muya from the bar, no evidence was led proving that the two attesting witnesses signed separately on the will contrary to dictates of the Indian Succession Act. As urged by Mr. Ngogo, the issue raised by Mr. Muya is wholly untenable and we reject it.

In the upshot, we find merit in the first ground of appeal and quash the finding of the High Court invalidating the will and holding that the testator died intestate. In its stead, we substitute a finding that the appellant proved her case that the Will was valid resulting into dismissing the respondent's caveat for being unsubstantiated. Consequently, the decision of the High Court is quashed and substituted with an order granting the probate to the appellant as prayed in the petition.

That said, we allow the appeal. Considering the nature of the dispute from which this appeal has emanated, we make no order as to costs.

Order accordingly.

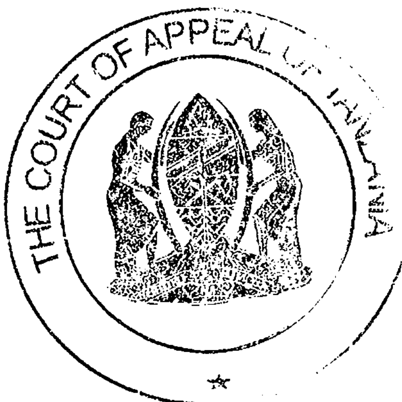
DATED at **MBEYA** this 11th day of December, 2024.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

A. A. ISSA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2024 in the presence of Ms. Joyce M. Kasebwa, learned counsel for the respondent and also holding brief of Mr. Luka Ngogo, learned counsel for the appellant, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL