IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LILA, J.A., WAMBALI, J.A. And KOROSSO, J.A.)

CIVIL APPEAL NO. 59 OF 2018

CHANTAL TITO MZIRAY.....1ST APPELLANT
ENOCK ANDREW MZIRAY .....2ND APPELLANT

VERSUS

RITHA JOHN MAKALA..... 1ST RESPONDENT
NGANA ANDREW MZIRAY .....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam District Registry)

(Sameji, J.)

Dated the 25th day of August, 2017
in
Probate and Administration Cause No. 62 of 2014

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JUDGMENT OF THE COURT

26th February & 31st December, 2020

WAMBALI, J.A.:

Ritha John Makala and Ngana Andrew Mziray, the first and second respondents respectively approached the High Court of Tanzania at Dar es Salaam on 28th November, 2014 where they petitioned for the grant of Letters of Administration of the Estate of the late Dr. Tito Mziray Andrew. In the said petition the respondents maintained that the thrust of their prayer to be appointed as administrators of the estate of their deceased father was based on the allegation that he died intestate on 16th October, 2014.

However, on 5th March, 2015 their petition encountered a caveat that was entered by the widow and son of the late Dr. Tito Mziray Andrew namely, Chantal Tito Mziray and Enock Andrew Mziray, who in the present appeal are the first and second appellants respectively. After the citation to the caveators was issued and replied accordingly in terms of the provisions of the Probate and Administration of Estates Act, [Cap. 352 R.E. 2002] (PAEA), it became apparent that the appellants' major contention was that the deceased left a valid Will in which he appointed the first appellant as the only trustee and executor of the said Will in respect of his estate. The appellants, therefore, strongly maintained that the respondents herein could not qualify to be appointed as administrators of the estate of the late Dr. Tito Mziray Andrew as prayed in the petition because he did not die intestate.

On the other hand, the respondents lodged counter affidavits in which they seriously challenged the existence, authenticity of the deceased's signature and the validity of the Will that was appended to the affidavit in support of the caveat. Essentially, they firmly deposed that the Will was not genuine, but a mere forgery because it did not belong to the late Dr. Tito Mziray Andrew. After the exchange of the said pleadings, as the matter turned to be contentious, in terms of section 52(b) of the PAEA, the proceedings

before the High Court took the form of a suit in which the petitioners (respondents) turned to be plaintiffs while those who opposed the petition (caveators-appellants) turned to be defendants.

In the result, the High Court heard witnesses for both sides and admitted some exhibits, and in the end, it found that the "purported Will" was invalid for failure to comply with the legal conditions and requirement of the law. Consequently, the "purported Will" was declared to have no legal effect and unenforceable. Having declared as it did, the High Court ultimately made the following specific direction: -

> *"In the premises, the administration of the estate of the late Dr. Tito Mziray Andrew will be administered with the understanding that the deceased died intestate, as the purported WILL is invalid, defective and untenable in law."*

Following the said declaration and direction, the High Court proceeded to deliberate on the issue as to who will be the administrator of the estate of the deceased. It is noteworthy that after a brief evaluation of the evidence in the record and submissions of the parties in respect of the caveat, the High Court took into account the different interests to be protected in the deceased estate and thus, in terms of section 22 (1) of the PAEA, on 25th August, 2017 it

appointed three administrators. Specifically, the High Court ordered that Letters of Administration of the estate of the late Dr. Tito Mziray Andrew be issued to Ritha John Makala, Ngana Andrew Mziray and Enock Andrew Mziray, the first and second respondents and second appellant herein respectively. Moreover, the joint administrators were ordered to file before High Court an inventory and final accounts of the deceased estate within six months from the date of the order.

As it were, the judgment and decree of the High Court did not please the appellants, hence this appeal. The appellants' displeasure is vividly expressed in the memorandum of appeal comprising ten grounds of appeal as demonstrated herein below: -

> *"1. That the learned trial Judge erred in law and fact by considering the issues concerning the validity of the Will which were not the centre of dispute as the court had already formed an opinion, through experts, that the Will of the deceased was not forged.*
>
> *2. That the learned trial Judge erred in law and fact by holding that the Will of the deceased was invalid, defective and untenable in law without regard to the fact that there was sufficient evidence that the deceased did not die intestate as*

the lawyer who witnessed the Will had knowledge to have done so.

3. *That the learned trial Judge erred in law and fact by granting letter of administration to RITHA JOHN MAKALA, a child born out of wedlock, contrary to the wishes of the family/clan meeting even after having been informed that she secretly decided to petition for letters of administration to avoid Enock Andrew Mziray who was duly appointed at the clan meeting.*

4. *That the learned trial Judge erred in law and fact by failing to consider that the deceased had left a widow, one CHANTAL ANDREW MZIRAY, who is equally interested in the deceased estate due to her contribution as some of the properties were acquired jointly by the deceased and his Wife (CHANTAL ANDREW MZIRAY).*

5. *That the learned trial Judge erred in law and fact by acting in discrimination and bias in picking RITHA JOHN MAKALA (born out of wedlock) and NGANA ANDREW MZIRAY (a foreigner) as administrators and leaving out the widow of the deceased one CHANTAL ANDREW MZIRAY.*

6. *That the learned trial Judge erred in law and fact by holding that some of the properties mentioned in the WILL did not belong to the deceased estate, at the stage of the petition for administration, without sufficient evidence and proof thereof.*

7. *That the learned trial Judge erred in law and fact by holding the governing law of the Will is Customary Law of Inheritance GN.436 of 1963 leaving aside ample evidence that the deceased professed Christianity the fact which was also certified by the petitioners in their petition.*

8. *That the learned trial Judge erred in law and fact by mishandling the evidence and having a premeditated decision on the validity of the Will of the deceased and who to grant the letters of administration.*

9. *That the learned trial Judge erred in law and fact by granting letters of administration to NGANA ANDREW MZIRAY who is residing in USA and not a citizen of Tanzania even after evidencing his failure to appear physically and give his testimony before the court in Tanzania.*

10. *That the learned trial Judge erred in law and fact by continuing to hear the final witness and compose the judgment after the file had been transferred to her without the consent of the parties and taking into account the interest of justice including the fact that some of the witnesses were not present in Tanzania."*

On the adversary, the respondents also felt uncomfortable with part of the judgment of the High Court. In the circumstance, they lodged a notice of cross-appeal premised on one ground of appeal to contest the appointment of

Enock Andrew Mziray, the second appellant as the co-administrator. For the sake of consistence, we reproduce the respective ground thus: -

> *"1. The learned trial Judge erred in law and in facts by granting Letters of Administration to the 2nd Appellant Enock Andrew Mziray without considering that the pleadings and testimonies of parties in Probate and Administration Cause Number 62 of 2014), clearly show that Enock Andrew Mziray is not in good terms with the other two appointed Administrators thus he will not cooperate with the other administrators in administering the estate of the late Dr. Tito Mziray Andrew."*

At the hearing of the appeal, Mr. Roman S. L. Masumbuko assisted by Ms. Velena Clemence, both learned advocates appeared for the appellants, while Mrs. Nakazaeli Lukio Tenga learned advocate appeared for the respondents. Noteworthy, on behalf of the parties, counsel lodged detailed written submissions in support of their respective positions with regard to the appeal and cross-appeal. They equally lodged a list of authorities as required by the Tanzania Court of Appeal Rules, 2009. However, it is significant to point out that in their brief oral submissions at the hearing they adopted different modalities of arguing the appeal and cross appeal. Specifically, Mr. Masumbuko argued together grounds 1 and 2; 6, 7 and 8; 4, 5 and 9; and grounds 3 and 10 separately.

On her part, Mrs. Tenga argued separately and generally each of the grounds of appeal. Lastly, both counsel submitted generally for and against one ground of the cross appeal.

Basically, it is noted that in his oral submission, the learned counsel for the appellants briefly explained the substance of the grounds of appeal, but substantially adopted the written submissions which he had lodged in Court earlier on in support of the appeal. In the end, Mr. Masumbuko implored us to allow the appeal and dismiss the cross appeal with costs.

On the other side, the counsel for the respondents presented her brief oral arguments in accordance with the sequence of the grounds of appeal as outlined above and then made submissions in support of one ground in the cross appeal. Similarly, she adopted the written submissions which she had lodged in court in opposition of the appeal and in support of the cross appeal. More importantly, she did not contest the substance of ground six of the appeal, but strongly maintained that her concession could not in any way change the merit of the decision of the trial court. To this end, she spiritedly urged us to dismiss the appeal and allow the cross appeal with costs.

On our part, unlike the style adopted by learned counsel for the parties, we will adopt a different approach in determining this appeal. Essentially, considering the circumstances of this appeal, we do not intend to follow the sequence of the grounds of appeal as outlined or the style adopted by the counsel for the appellants and respondents. In determining this appeal, therefore, we deem it appropriate to start our deliberation with ground 10 of the appeal.

It was strongly contended in support of ground 10 by the counsel for the appellants that the trial judge who composed the judgment did not take into account the interest of justice by taking over the hearing of the case in disregard of the law concerning transfer of partly heard cases. Mr. Masumbuko emphasized that the successor judge took over the conduct of the case after the file was transferred to her and heard only one witness without the consent of the parties.

In his spirited submission, as the predecessor judge had heard all witnesses for the petitioners and one for the defendants (caveators), he was better placed to assess their credibility and thereby ensure integrity of the judicial proceedings, transparency and justice. To this end, he strongly argued that the successor judge did not comply with the provisions of Order XVIII

Rule 10 (1) of the Civil Procedure Code, Cap.33 R.E. 2002 (the CPC) as she did not assign the reasons as to why she took over the hearing of the case from the predecessor judge. The learned counsel, thus, argued us to find that the omission occasioned miscarriage of justice. In his view, as the successor judge took over the trial before the last witness for the appellants' testified, she greatly relied on final submissions of the parties to decide the dispute between the parties in disregard of the ample evidence in the record of proceedings much as she did not have the opportunity to hear all witnesses for both sides. To support his submission, he referred the Court to its decisions in **National Insurance Corporation of Tanzania Limited v. Jackson Mahali,** Civil Appeal No. 94 of 2011 and **Oysterbay Villas Limited v. Kinondoni Municipal Council**, Civil Appeal No. 173 of 2017 (both unreported). Ultimately, the learned counsel for the appellants implored us to nullify the trial court's proceedings and allow the appeal.

Mr. Masumbuko's contention on this matter was strongly opposed by the Mrs. Tenga who supported the taking over of the case by the successor judge. She contended that the successor judge acted within the requirement of the law. She submitted further that Mr. Masumbuko's contention is misconceived, much as according to the record of appeal, before the successor judge took

over the case, she informed the parties concerning the transfer of the predecessor judge (Feleshi, J – as he then was) from Dar es Salaam to another station; and that there was no possibility for him to finalize the case, hence she took over after being re-assigned to her by the judge in-charge. In her submission, the successor judge fully complied with the provisions of Order XVIII Rule 10 (1) of the CPC. In the circumstances, she pressed us to dismiss this ground of appeal for lacking merits.

On our part, having thoroughly perused both the record of appeal and the original record of proceedings of the trial court, we have no hesitation to state that the appellants' complaint on this ground is unfounded. We are settled that the successor judge fully complied with the provisions of Order XVIII Rule 10 (1) of the CPC. Undoubtedly, the record of appeal bears out that the trial started before Feleshi, J (as he then was) and after his transfer from Dar es Salaam to another station, Sameji, J (as she then was) took over the conduct of the trial in which she recorded the evidence of one witness (DW2) for the caveators (appellants), considered the parties' written submissions and composed the judgment.

More importantly, the record of appeal clearly indicates from pages 267 – 269 that the successor judge took considerable effort to inform the parties

concerning her taking over the trial of the case after the predecessor judge was unable to conclude it due to his being transferred to another station. Admittedly, the successor judge even adjourned the hearing for the purpose of consulting the judge in charge to ascertain whether it was not possible for the predecessor judge to finalize the trial of the case. It is in the record that she was informed by the judge in charge that it was not practicable for the predecessor judge to conclude the trial of the case. Thus, she was assured that the reassignment of the case to her was justified in the circumstances. We further note that soon after that response, she informed the parties of the respective position before she set the date of hearing. Besides, the record of appeal does not indicate that parties or their counsel who were in court on that day disagreed to proceed with the hearing of the case presided over by the successor judge. We are in this regard entitled to conclude that given the said information and the go ahead from the parties, the successor judge properly proceeded from where the predecessor judge had reached until she finalized the trial of the case and composed the judgment. It is indeed unfortunate that Mr. Masumbuko was not by then representing the appellants.

Nevertheless, we respectfully think that although Mr. Masumbuko was not the appellants' (caveators) counsel by then, he did not need an assistance

from anybody other than the record of appeal to come to the conclusion that the successor judge presided over and determined the partly heard case in accordance with the requirement of the law. In our respective view, contrary to his spirited submission, we find that the successor judge properly complied with the requirement of the law before she took over the trial of the case. In the circumstances, we entirely agree with Mrs. Tenga that the appellants' complaint in ground 10 is baseless. It follows that even the decisions of the Court referred by Mr. Masumbuko in support of his submission on this matter are distinguishable and not applicable in the circumstances of this case. Consequently, we dismiss ground 10 of the appeal.

Having, disposed the crucial complaint on the authority of the successor judge to preside over and determine the case the subject of this appeal, we now turn to consider the remaining grounds of appeal.

At this juncture, it is pertinent to point out that our close scrutiny of the remaining grounds of appeal leads us to the observation that the complaint concerning the authenticity and validity of the "purported Will" which we think was the centre of controversy of the dispute between the parties, clearly features in the appellants' complaints in grounds 1, 2, 6, 7 and 8 of the memorandum of appeal.

However, upon further reflection on the substance of the complaint on those grounds of appeal, we are of the considered opinion that the respective complaints cannot be determined without asking and answering two questions. These are; first, whether the caveat which necessitated the proceedings before the trial court to be contentious was fully determined as required by the law. Second, whether the trial court properly and legally evaluated the validity of the "purported Will" and in the end relied on it to reach the conclusion that it was invalid while it was not tendered and admitted in evidence at the trial.

It was in this regard that in the course of hearing the appeal and cross appeal, we requested counsel for the parties to address us on those questions among other arguments in support of their respective positions.

On his part, Mr. Masumbuko generally submitted that the procedure of determining the caveat was not followed as required by the law. He argued that the Will which was greatly relied upon in the judgment of the trial court to reach the conclusion that it was invalid was not tendered and admitted in evidence. In his submission, as the Will was not tendered and admitted in evidence it was wrong for the trial court to rely on it contrary to the provisions of Order XIII Rule 7(2) of the CPC. Moreover, he submitted that the caveat was not properly determined because the Will which was the subject of the

appellants' objection to the petition of the respondents was not tendered and admitted in evidence and thus it could not be a subject of the decision concerning its validity. Basically, he contended that the appointment of the second appellant and the respondents as administrators of the estate of the late Dr. Tito Mziray Andrew was of no effect. In his opinion, the failure of the trial judge to determine the caveat rendered the entire trial a nullity. Ultimately, he pressed us to nullify the trial court's proceedings and the order appointing the administrators of the deceased estate.

On her part, both in her oral submission before us and written submissions in response to the first ground of appeal, Mrs. Tenga readily conceded that it was not proper for the trial judge to determine the validity of the Will which was not tendered in court. She further stated that in terms of Order XIII Rule 7 (2) of the CPC, a document which is not admitted in evidence shall not form part of the record and shall be returned to the person producing it. To support her submission, she referred us to the decision of the Court in **Japan International Cooperation Agency v. Khaki Complex Limited** (2006) TLR 343.

On the other hand, Mrs. Tenga strongly disagreed with Mr. Masumbuko's contention in his written submission in support of the appeal that the trial

court wrongly declared the Will as invalid while it had already formed an opinion through an expert evidence that it was not forged. She stated that the appellants' counsel argument was misleading. In her view, the trial judge properly acted on the Will as if the "purported Will" was tendered and found out that it was invalid for the reasons she gave in the judgment. Precisely, she strongly maintained that while she agreed with the appellants that the trial judge erred and misdirected herself when she considered the validity of the "purported Will" which was never tendered and admitted as exhibit, she still supported the trial court's finding that the "purported Will" which was attached to the affidavit in support of the caveat was invalid. She firmly submitted that in the circumstances of the other evidence in the record of appeal, the trial court was entitled to conclude that the late Dr. Tito Mziray Andrew died intestate as the "purported Will" was not genuine but a mere forgery. She therefore, urged us to dismiss the complaints in the respective grounds of appeal.

On our part, in determining the two questions in respect of the grounds of appeal stated above, we think it is appropriate firstly, to discuss some of the provisions of the law concerning the determination of a petition after a caveat is entered by the caveator, in terms of section 58 (1) of the PAEA. It is not

doubted that once a caveat has been entered the proceedings for any grant will be stayed pending determination of the caveat. For purpose of guidance, section 59 (1) of the PAEA provides as follows: -

> *"Save as provided in this section, no proceedings shall be taken on a petition for probate or letters of administration after a caveat against the grant or a copy thereof has been entered with court to whom application has been made so long as the caveat remains in force."*

On the other hand, according to the record of appeal, we entertain no doubt that the petitioners (respondents) complied with the provisions of section 59 (2) of the PAEA and Rule 82 (3) of the Probate and Administration of Estate Rules (the Probate Rules) by moving the trial court to issue citation to caveators after that court complied with section 61 (1) (a-c) of the same Act.

Equally important, the caveators (appellants) precisely complied with the requirement of the law as upon being called upon to show cause whether they supported or opposed the petition, they immediately, in terms of Rule 82 (4) of the Probate Rules, responded by lodging the affidavits in support of the caveat. Similarly, on their part, upon being served with a copy of appearance and the affidavits in terms of Rule 82 (5) of the Probate Rules, the petitioners

equally lodged their respective counter affidavits against the caveators' affidavits.

It is instructive to emphasize that the law requires that after the petitioner and caveator have complied with the provisions of the law stated above, in terms of section 52 (b) of the PAEA, the proceedings subsequent to the caveat for an application for any grant will turn to be contentious and each side is required to adduce evidence to substantiate its claim. In the present case, we note that as the parties fully complied with the requirement of the law as alluded to above, the proceedings before the trial court, took the form of a civil suit where the petitioners were treated as the plaintiffs while the objectors to the grant (caveators) were treated as the defendants.

For purpose of clarity, the provisions of section 52 (a) (b) of the PAEA provides as follows: -

> *52. "Except as hereinafter provided, and subject to any probate Rules made in that behalf: -*
>
> *a) The proceedings of the Court relating to the grant of probate and letters of administration shall be regulated so far as the circumstances of the case admit, by the Civil Procedure Code, or any enactment replacing the same; and*

b) In any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the petitioner for the grant shall be plaintiff and a person who appears to oppose the proceeding shall be defendant."

Having laid down the relevant provisions regarding the procedure of determining the petition which turns to be contentious, our perusal of the record of appeal in the present case leads us to a settled view that until the proceedings turned contentious, the trial court precisely followed the law, as parties were invited and in fact adduced evidence in support of their respective positions. The next question, however, is whether the caveat was determined as required by law.

At this juncture, we wish to plainly state that for the purpose of our judgment, and for the reason which will be apparent herein below, we do not intend to base our deliberation into the detailed discussion of the evidence of the parties in the record of appeal. Our concern will be on the basis and the circumstances in which the trial court evaluated and applied the substance of the evidence to come to the finding that the "purported Will", the subject of the caveat was invalid while it was not tendered and admitted in evidence at the trial.

As we have intimated above, fortunately, though counsel for the parties disagreed on the ultimate finding of the trial court on the invalidity of the "purported Will", they are in agreement that the trial judge wrongly relied on the Will which was not tendered and admitted as exhibit in court. On our part, we hold the view that the extensive reference in the judgment and the ultimate finding on the validity of the document which was neither tendered by either side of the case nor admitted in evidence at the trial, was, with profound respect, a serious irregularity which went to the root of the dispute which had to be determined by the trial court. As correctly stated by Mrs. Tenga, the reliance on the Will was contrary to the provisions of Order XIII Rule 7(2) of the CPC which bars the use of documents not legally tendered and introduced into evidence. It was therefore not legally proper for the trial judge to have heavily and substantially evaluated the contents of the 'purported Will" in her considered judgment. However, we do not, with respect, agree with Mrs. Tenga's divergent views in her submission that despite that omission, the trial judge correctly arrived at the decision that the "purported Will" was invalid as she considered other evidence in the record of appeal. We hold that view because our careful perusal of the record of appeal leaves no doubt that the trial court's decision on the validity of the "purported

Will" basically and essentially relied on the evaluation of the law on making a Will and the respective defects in its contents. Unfortunately, the reliance on the respective document was in disregard of the fact that it was contrary to the requirement of the law.

In the result, considering our deliberation above and the record of appeal, we have no hesitation to state that despite the conclusion reached by the trial court on the alleged invalidity of the "purported Will", the caveat which was the subject of the objection to the petition, was not determined as required by law. For clarity, we find it prudent to reproduce the holding of the trial court before it proceeded to determine the petition: -

> *"After I have pointed out all the above defects on the WILL, it is therefore my respectful view that, there is considerable merit in Mrs. Tenga's submission in that the WILL is invalid for non-compliance with the legal requirements. It is therefore the finding of this court that, since the legal conditions and requirement of making a valid WILL were not complied with there is no valid WILL made by Dr. Tito Mziray Andrew.* ***The purported WILL produced by the caveators herein has no legal effect and cannot be enforceable.*** *In the premises, the administration of the estate of the late Dr. Tito Mziray*

Andrew Will be administered with the understanding that the deceased died intestate, as ***the purported WILL*** *is invalid, defective and untenable in law."*

(Emphasis Added)

Noteworthy, the trial judge made that finding after she extensively evaluated the evidence of the parties in the record of appeal on the validity of the Will and its contents and in relation to the requirement of the law, though according to the record of appeal the respective document was not tendered and admitted in evidence. On the other hand, it is noted that from the reproduced part of the trial court's judgment above, as reflected in the bolded words, the trial judge seemed to indicate that the "purported Will" was produced by the coveators at the trial. However, on our perusal of the record of appeal and upon considering the concurrent submissions of the counsel for the parties at the hearing, it is apparent that the Will was neither tendered nor admitted into evidence.

In this regard, we wanted to satisfy ourselves whether the original record of proceedings of the trial court could reveal a different position which is consistent with the observation of the trial judge that, **"the purported Will produced by the caveators has no legal effect and cannot be**

enforceable". Our construction of the above statement led us to think that may be the Will was tendered in court but the trial court forgot to admit it in evidence. We firmly thought that the perusal of the original record was inevitable because the appellants included in the record of appeal some documents reflected at pages 298 and 299, which the respondents strongly disputed to form part of the record of the trial court proceedings. The respondents firmly submitted that the respective documents which concern the witnesses to the "purported Will" were neither tendered nor admitted in evidence and thus they could not be part of the proceedings before the trial court. In the circumstances, in the interest of justice, we had to embark on the mission to thoroughly peruse the original record of the proceedings. Besides, we could not simply rely on the record of appeal before us to resolve the contending submissions of the parties on the correct positions on the matter, much as the record of the court is always taken to be authentic and cannot be easily impeached until proved otherwise. Unfortunately, our desire was not realized within a reasonable time as it was not practicable to obtain the said original record of proceedings since it was not easily traced in the Court's Registry. It was until recently that the Registrar managed to trace it and place

it before us for our perusal. In the event, the delay in composing and delivery of this judgment is highly regretted.

What is important however, is that our careful perusal of the original record of appeal patently led us to the conclusion that, firstly, the documents connected to the making of the "purported Will" stated above which were included in the record of appeal by the appellants were neither tendered nor admitted in evidence by the trial court. Therefore, they cannot be part of the record of appeal before us. Fortunately, the judgment of the trial court did not make any reference to the respective documents. They are thus not part of the impugned judgment. Secondly, we are satisfied that the "purported Will" which was extensively relied in the impugned judgment of the trial court to reach the conclusion that it is invalid was neither tendered nor admitted in evidence at the trial. Therefore, though it is not disputed that the Will was attached to the caveat in support of the caveat, the trial court wrongly, with respect, relied on it to reach the conclusion concerning the dispute between the parties. At this juncture, we think it is appropriate to reiterate what the Court stated in **Abdallah Abas Najim v. Amin Ahmed Ali [2006] TLR** 55 that: -

> *"Annexures to the plaint are not exhibits in evidence; they cannot be relied upon as evidence and cannot be the basis of the*

decision; As the annexures to the respondent's plaint were not tendered in court as exhibits and were not tested in evidence, it was improper for the learned Regional Magistrate to base his judgment on those annexures".

Similarly, in **Japan International Cooperation Agency v. Khaki Complex Limited** (supra) the Court concisely stated that: -

"This Court cannot relax the application of Order XIII Rule 7 (1) of the Civil Procedure that a document which is not admitted in evidence cannot be treated as forming part of the record although it is found amongst the papers in the record".

Applying the settled position of the law in the present case, and as we are settled that both the original record of proceedings and the record of appeal leave no doubt that the "purported Will" was neither tendered nor admitted in evidence, we hold that the trial court wrongly relied on it to come to the conclusion that it was invalid and enforceable in law.

On the other hand, we note that from the reproduced part of the judgment, it is without doubt that the trial court did not make any pronouncement concerning the final determination of the caveat. To be specific, the trial court in its holding did not categorically and legally state

whether the caveat was dismissed or allowed before it proceeded to determine the petition which had remained pending after the matter turned contentious. In the circumstances of this case, we hold the firm view that as the caveat was not determined to the conclusion it remained in force. Thus, the petition which was stayed in terms of section 52(b) of the PAEA was equally not properly resolved as the caveat remained pending as we have alluded to above.

We are therefore of the settled view that the trial judge was supposed to make specific pronouncement with regard to the status of the caveat, that is, whether it was dismissed or allowed before she proceeded to determine the petition which was lodged by the respondents. It is this regard that in an akin situation, in **Kijakazi Mbegu and 5 Others v. Ramadhani Mbegu** [1999] TLR 174, it was held that the trial District court erred in granting Letters of Administration to the respondent while the caveat was in force. In the premises, we respectfully disagree with the learned counsel for the respondents that the caveat was conclusively determined by the trial court and that the order appointing the administrators of the deceased estate was in accordance with the law.

Be that as it may, as we have intimated above, after that pronouncement, the trial court proceeded to evaluate the evidence briefly and it then appointed the three named administrators as alluded to above.

Moreover, our close scrutiny of the record of appeal entitles us to state that the extensive reliance to the "purported Will" in the impugned judgment cannot, in our respective opinion, be entirely blamed on the trial court only. Parties and their counsel are equally to blame. We say so because the record of appeal clearly shows that parties for both sides extensively testified for and against the existence, authenticity and validity of the Will. Similarly, witnesses for both sides were extensively cross examined on the credibility of the Will and its contents. Yet, throughout those proceedings parties were aware that the said Will was not tendered and admitted in evidence. According to the record of appeal failure of the appellants to tender the Will as exhibit was made apparent when their counsel failed to secure the attendance in court of the lawyer who allegedly prepared the Will and one of the witness to it. As a result, the trial court refused to admit in evidence the two documents namely, the affidavit of the lawyer and the declaration of the witness to the Will despite the request from the appellants' counsel. As we have alluded to above these

are the documents which were erroneously included in the record of appeal at pages 298 and 299.

Unfortunately, despite that state of affair, in their spirited written submissions in support of their respective side of the case, both counsel for the parties extensively locked horns on the validity of the Will and its contents though they were fully aware that it was not tendered and admitted in evidence at the trial. In our respectful view, we think this greatly made the trial court to stray into the same error of making extensive reference to the Will in its judgment. In the present case, we are settled that counsel for the parties who were fully aware that the Will was not tendered and admitted in evidence, were obliged in their respective final written submissions to inform the trial court the correct position of the law concerning noncompliance with the provisions of Order XIII Rule 7(2) of the CPC, in order to assist it to decide the dispute based on the evidence in the record and the requirement of the law. It cannot be overemphasized that counsel should always assist the court to determine disputes between the parties justly and fairly and in accordance with the law instead of misleading it.

It is in this premises that we regrettably and respectfully disagree with the learned counsel for the respondents, who in her written submission in support

of the petition, firmly alleged that the said "Will was a forged document and that is why the appellants in their testimonies quietly and conveniently avoided it and did not tender as evidence; perhaps as a safer move than to risk criminal proceedings for forgery". Yet, in her written and oral submissions before this Court, despite acknowledging that the Will was not tendered and admitted in evidence and that the said omission could not entitle the trial court to rely on it to determine its validity, she still argued that the trial court was entitled and perfectly looked at other evidence to determine its validity. Basically, she argued that the trial court properly acted as if the "purported Will" was tendered and found out that the same was invalid for the reasons given in the judgment. That submission was rightly, in our respectful view, strongly resisted by the appellants' counsel because it is not backed by the record of appeal. As we have demonstratively stated herein above, there is no doubt that the validity of the "purported Will" was essentially made based on the evidence on the "purported Will" while it was not tendered and admitted in evidence at the trial.

On the other hand, we wish also to point out, albeit in passing, that the problem in deciding the dispute which was the subject of the caveat was complicated by the fact that the parties and the trial court did not agree on the

real issues before the trial started. Notably, the trial court framed only one issue in the course of composing the judgment. Nonetheless, we think that the said issue was not consistent with the pleadings borne from the affidavits and counter affidavits lodged by the parties. We must emphasis that issues framed by the court and agreed by the parties in a trial of a civil suit are intended to draw the attention of the judge or magistrate and the parties to the precise matters which are in dispute, instead of allowing the case to be left wondering in a vague state. Issues, therefore, bind the parties and the court respectively to adduce evidence and make the decision in an orderly manner guided by the pleadings, the adduced evidence and the law. We are mindful of the settled position of the law as developed by the Court in **Jahari Sanya Jussa and Another v. Salehe Sadiq Osman,** Civil Appeal No. 51 of 2005 and reaffirmed in **George Minja v. The Attorney General,** Civil Appeal No. 75 of 2013 (both unreported). In the former decision the Court stated that: -

> *"the omission to frame issues at the beginning of a trial is not necessarily fatal, unless upon examination of the record it can be shown that as a result of that omission the parties were denied opportunity to adduce evidence or to address the point or having gone to the trial not*

knowing what was at stake thus affecting the merits of the case and thus occasioned a failure of justice".

[Emphasis Added]

However, in the present case, having examined the record with regard to the pleadings of the parties to the dispute, the evidence which was adduced without regard to the real issues in dispute and the extensive reference to the Will at the conclusion of the trial and the ultimate decision made by the parties and the trial court respectively, we are entitled to conclude that the merit of the case was greatly affected and thus a failure of justice was occasioned.

In the result, based on our deliberation above, we answer both issues we raised with regard to the respective grounds of appeal Nos. 1,2,6,7 and 8 in the affirmative. In the event, we allow the appeal on those grounds albeit for different reasons.

Consequently, as we are satisfied that the irregularities pointed above went to the root of the trial of the caveat which necessitated the matter to be contentious, we find that injustice was occasioned to the parties to the extent that it rendered the entire trial a nullity. Basically, we have no hesitation to state that in the present case the proceedings before the trial court soon after the matter turned contentious and parties were invited to adduce evidence

were a nullity, much as, at the end of the trial the crucial issue on the authenticity and validity of the Will which was the subject of the caveat was not legally determined.

Having taken that position, we do not deem it prudent to deal with the rest of the grounds of appeal in the memorandum of appeal. Similarly, we do not find it important to determine the cross- appeal which necessarily touches on the proceedings and the order of the trial court which we have found to be null and void.

In the event, we invoke the power of revision conferred on the Court by the provisions of section 4 (2) of the Appellate Jurisdiction Act, Cap.141 R.E 2019, to revise and nullify the proceedings of the trial court and the subsequent order appointing the second appellant and the respondents as administrators of estate of the late Dr. Tito Mziray Andrew. In the result, we order a retrial for the purpose of determining a caveat in accordance with the law from the stage where the matter turned to be contentious before the parties were called upon to adduce evidence. The retrial should be conducted before another judge as soon as practicable.

Lastly, in the circumstances of this appeal, we order that parties shall bear their respective costs.

DATED at **DAR ES SALAAM** this 30th day of December, 2020.

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

The Judgment delivered this 31st day of December, 2020 in the presence of Ms. Velena Clemence, learned counsel for the Appellants and Mr. Grayson Laizer, learned counsel for the Respondents is hereby certified as a true copy of the original.

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL