

**THE UNITED REPUBLIC OF TANZANIA**

**JUDICIARY**

**IN THE HIGH COURT OF TANZANIA**

**MTWARA DISTRICT REGISTRY**

**AT MTWARA**

**LAND APPEAL NO. 36 OF 2021**

*(Originating from the decision of the District Land and Housing Tribunal for Mtwara at Mtwara Application No. 9/2020)*

**JAMILA TWALIBU MKWAVILA** (Administratrix of the Estates of the Late Twalibu Saidi Mkwavila).....**APPELLANT**

*VERSUS*

**SALIMA SELEMANI** (Administratrix of the Estates of the Late Selemani Saidi Mkwavila).....**RESPONDENT**

**JUDGEMENT**

*4/4/2023 and 30/5/2023*

**LALTAIKA, J.,**

The appellant herein **JAMILA TWALIBU MKWAVILA** who is the administratrix of the estate of her late father Twalibu Saidi Mkwavila is dissatisfied with the decision of the District Land and Housing Tribunal for Mtwara (the DLHT) in Application No. 9/2020. She has appealed to this court on the following grounds:

1. *That the honorable chairperson erred in law and fact by holding that, there were no evidence to proof (sic!) that, the late Selemani Saidi Mkwavila through his will intended to transfer ownership of the two-business premises (rooms number 05 and 31) to Twalibu Saidi Mkwavila.*
2. *That the honorable chairperson erred in law and fact by holding that, the existence of the certificate of title with the name of the late Selemani Saidi Mkwavila is a conclusive evidence that the testator (late Selemani Saidi Mkwavila), never intended to transfer ownership of the two-business premises (rooms number 05 and 31) to Twalibu Saidi Mkwavila.*
3. *That the honorable chairperson erred in law and fact by concluding that, the Agreement made by heirs [Exhibit D2] was to govern the manner in which the deceased estate was to be administered in the circumstance where the testator's will, provided contrary to the same.*
4. *That the honorable chairperson erred in law and fact by holding that, the two-business premises (rooms number 05 and 31) never formed part of the estate of the late Twalibu Saidi Mkwavila.*
5. *That the honorable chairperson erred in law and fact by holding that the late Twalibu Saidi Mkwavila is not the owner of the two-business premises to wit rooms number 05 and 31 located at Mkuti ward, Santorini area, Masasi District – Mtwara region.*

When the appeal was called on for hearing on 18/10/2022, **Ms. Happyness Sabatho** and **Mr. Rainery Songea**, learned Advocates appeared for the appellant and respondent respectively. The learned counsel opted for hearing by way of written submissions. This court nodded with approval and a schedule to that effect was jointly agreed. The agreed schedule was complied with except for the appellant's rejoinder initially scheduled for the 22<sup>nd</sup> day of November 2022 but extension of time was granted as the court was satisfied with reasons advanced for the delay.

At this juncture, I consider it imperative to provide the necessary factual and contextual backdrop leading to this appeal. The appellant and respondents herein are close relatives. They are cousins. Their late fathers were siblings. The late Twalibu Saidi Mkwavila and Selemani Saidi Mkwavila were more than brothers. It appears that Selemani was more affluent than

his brother Twalibu. He was blessed with a sizable number of landed property including business premises (known locally as "frames") located in Mkuti within one of the fastest growing towns in southern Tanzania, Masasi.

It appears further that Selemani was not only blessed with earthly things but also a big and compassionate heart. He shared his property not only with his immediate family (wife and children) as most people nowadays do, but also his siblings who were not as fortunate. Before his demise on 19<sup>th</sup> day of April 2012, Selemani allegedly wrote a will indicating how he wished his property to be shared. **Apparently, the purported will is not dated. However, it was certified as a true copy of the original by a Magistrate on the 25<sup>th</sup> of June 2020,** most likely in preparation for the legal wrangles that would soon ensue.

As one reads through the purported will, a sizeable number of real property were bequeathed to members of the testator's immediate family wife and children. The only exception are three siblings: Khadija Saidi, Ausi Saidi, Twalibu Saidi and Nassoro to whom their brother bequeathed two business premises each. The name Twalibu Saidi father of the appellant herein appears as item number 12. Business Premises Number 31 and 05 located at Santorini, Mkuti Area, Masasi were allegedly bequeathed to him.

Although the authenticity of the will would later be questioned in the trial tribunal, halfheartedly I would say, it appears the same was initially ignored for the sake of peace. I can also suspect that the existence of the same was unknown for a while until the court processes begun. I will take the opportunity offered by this judgement later to remind the learned

magistrates to refrain from certifying documents unless it is absolutely necessary. Authorities on that position abound.

All in all, a family meeting allegedly took place on the 25<sup>th</sup> day of June 2012 whereupon siblings of the late Selemani Saidi Mkwavila (Nassoro, Twalibu, Hadija and Ausi) agreed that they would not pass on to their children the property bequeathed to them by their late brother.

The crux of the matter in the instant appeal can therefore be traced to the demise of Twalibu Saidi Mkwavila on the 8<sup>th</sup> day of June 2017. The present respondent Salima Selemani Mkwavila, upon being appointed administratrix of the estate of her late father Late Selemani Saidi Mkwavila moved on to enforce the "family agreement" by ordering tenants of the business premises hitherto bequeathed to her late uncle Twalibu, to start paying rent to her.

The appellant herein who was also appointed administratrix of the estate of her late father Selemani Saidi Mkwavila thought the move was unfair and unjustifiable. She knocked on the doors of the DLHT for Mtwara as alluded to above. The tribunal, however, adjudged in favour of the respondent. The next parts of this judgement are the arguments for and against the appeal as submitted by the learned counsel for the appellant and respondent respectively.

Submitting in support of the appeal, Ms. Sabatho was extraordinarily brief. She averred that according to PW1, PW2, and PW3, and in support of exhibit P2, the late Selemani Saidi Mkwavila bequeathed his business frames No. 5 and No. 35 to the Late Twalib Saidi Mkwavila. According to **Rule 23**

**of Local Customary Law Declaration Order No. 4 of 1963 (GN No. 436 of 1963)**, Ms. Sabatho argued, "a written will may be modified or revoked by another written will."

To buttress her argument, the learned counsel quoted from, Tenga W.R and Mramba S.J, *Theoretical Foundations in Land Law*, where at page 221, the learned authors state that "**Any alteration of the will must be done by the testator himself.**" Ms. Sabatho went on to build her case that in the instant matter it was the late Selemani Saidi Mkwavila who bequeathed to his relatives. The respondent's reliance on the evidence of the minutes of family member's [meeting] does not revoke the valid will written by a testator, argued Ms. Sabatho. She emphasized that she was of a firm conviction that the will remain valid.

In conclusion, Ms. Sabatho noted that merely having a title of ownership of the deceased did not guarantee that the will had been revoked. She explained that the will specifically state the beneficiary of the disputed land. The appellant's deceased father emphasized Ms. Sabatho, was among the beneficiaries. The learned counsel prayed that the appeal be allowed and that costs be awarded.

It was time for the learned counsel for the respondent. Mr. Songea stated that frame No. 35 submitted by the counsel for the appellant in their submission was not part of the dispute and was not the property of the late Twalibu Saidi Mkwavila that was being disputed by the parties involved. The counsel had raised new facts that were not pleaded at the trial court and in

their memorandum of appeal, and had argued civil appeal number 10 of 2021, while the appeal at hand was civil appeal number 36 of 2021.

Mr. Songea pointed out that it was a fundamental principle of law that what was pleaded in the pleadings must be proved, but the appellant had failed to prove their allegation as stated in the first ground of appeal, instead raising a new claim that the suit premises, namely frame number 5 and 35, belonged to the late Twalibu Saidi Mkwavila following the bequeath by the late Selemani Saidi Mkwavila, as cited in the case of **Juma Jaffer Juma V. Manager PBZ LTD and 2 others, civil appeal number 7 of 2002** at page 16 and 17.

He also noted that the appeal originated from the District Land and Housing Tribunal for Mtwara at Mtwara, and that the subject matter of the dispute was the business frames No. 5 and No. 31, and not No. 35. Therefore, the counsel for the appellant had raised a new claim at this stage in their submission and contended that the evidence produced at the trial tribunal proved that the Late Selemani Saidi Mkwavila bequeathed the same to the late Twalibu Selemani Mkwavila.

Mr. Songea emphasized that the appellate court could not deal with matters that were not raised and determined at the trial court. To support his argument, the learned counsel referred this court to the case of **Hamisi Bushiri Pazi and 4 others vs Saul Henry Amon & 4 others** civil Appeal No. 166 of 2019 CAT at Dar es Salaam (unreported).

Having clarified the records and raised the bar for consideration of issues not previously pleaded, Mr. Songea emphasized that the one who

alleges must prove and the burden of proof in civil cases lies with the person who needs the court to act in their favor, in accordance with **section 110(1) and (2) of the Evidence Act Cap 6 R.E 2022**. He further pointed out that the appellant failed to prove her allegations on the required standard that the late Selemani Saidi Mkwavila bequeathed the suit premises to the late Twalibu Saidi Mkwavila through a will which was adduced before the trial tribunal and marked as annexure P2.

Mr. Songea referred to the case of **Anthony M. Masanga vs Penina** (mama mgesi) and Lucia (Mama Anna), Civil Appeal No. 118 of 2014 (unreported), where it was held that the burden of proof lies with the party who alleges anything in their favor. He argued that Exhibit P2, claimed to be a will, produced, and relied upon by the appellant at the trial tribunal was not a valid will since it lacked the essentials of a **valid will, namely, a date when it was constructed and signatures of the persons who witnessed it when it was signed by the said Selemani Said Mkwavila**. Therefore, nothing had been produced to prove the allegations, and the appellant was required to produce a valid will to support her claims.

Mr. Songea referred to Rule 18 of the Local Customary Law (Declaration) Order No. 4 of 1963, which elaborates that the date on which the will was written must be inserted, and argued that the will produced by the appellant at the trial tribunal did not show the date when it was prepared, signed, and attested. He also referred to Rule 19 of the same law, which states that a written will must be attested by witnesses who know how to read and write, and that witnesses should number at least two (one from the clan and a neutral person) if the person who made the will knows how

to read and write. There should be at least four witnesses (two from the clan and two from neutral people) if the person who made the will is illiterate. Rule 21 of the same law provides that witnesses should attest the signature or the mark of the testator and also sign the will.

Mr. Songea argued that the will that was produced by the appellant at the trial tribunal lacked the legal qualifications mentioned above, i.e., no date was inserted to show when it was prepared, and no witness attested the same at the time when it was prepared and signed by the testator. Therefore, nothing had been produced to prove the bequest done by the late Selemani Saidi Mkwavila of the disputed premises to the late Twalibu Saidi Mkwavila as submitted by the counsel of the appellant. He agreed that Rule 23 of **the Local Customary Law (Declaration) Order No. 4 of 1963**, together with the quotation from the book "Theoretical Foundation in Land Law" by Tenga W.R and Mramba S.J, were not being disputed, but argued that the evidence produced before the trial tribunal was not sufficient enough to prove the allegation that the late Selemani Saidi Mkwavila bequeathed the disputed premises.

She stated in rejoinder that the issue of the validity of the will was not raised or determined by the trial tribunal, and therefore it was improper to raise it in the appellate stage. She referred to the case of **Hotel Travertine Limited and two others v. National Bank of Commerce Limited [2006] TLR 133**, in which the court stated that as a matter of general principle, an appellate court cannot consider matters not taken or pleaded in the court below. She also referred to the case of **Richard Majenga vs.**

**Specioza Sylvester, Civil Appeal No. 18 of 2018 CAT** (unreported) to support this point.

She further stated that the will was tendered before the trial tribunal and cleared for admission, and that it was not objected by the Respondent. This was evidence that the Respondent was aware of the will and did not dispute it. She referred to the case of **Kilombero Sugar Company Ltd vs. Commissioner General, TRA, Civil Appeal No. 261/2018 CAT** (Unreported) to support this argument.

According to exhibit P2 (will), the late Selemani Saidi Mkwavila bequeathed his properties through it during his lifetime, and after his death, the same will was used to distribute the deceased's properties to the beneficiaries. However, after the said distribution, D2 (Muhtasari) was for amending the will since it intended to change the testator's wishes, as the will was silent if he bequeathed properties to the beneficiaries, including the Appellant's father, was temporary. She reiterated her earlier submission in support of the Appeal and prayed that it be allowed with costs.

I have dispassionately considered the rival submissions by the learned counsel. I have also examined rather carefully, lower court records including the impugned judgement. One thing is clear, while property can be transferred kindness and other virtues cannot. Indeed, one generation can pass on the wealth it has accumulated to up to the third or fourth generation but there is no guarantee that ethical values and family ties go along with the property.

In the matter at hand, fathers of the appellant and the respondent "Wazee" Twalibu Mkwavila and Selemani Mkwavila lived in love. They shared

the fortune that the elder brother was blessed with. Unfortunately, that kindness has probably not been passed on to Jamila and Salima, their respective daughters.

Upon the death of her father, Salima went through all required legal procedures to secure the property of her late father. As an administratrix of the estate of her late father, she is empowered to deal with the same as ordered by the family. She has found it wise to start receiving rent from property hitherto (temporarily) given to her uncle the appellants father. What law prevents her? She might have painted a picture that she is not as kind as her late father Selemani but is that in contravention of any of our laws?

The learned counsel for the appellant **Ms. Sabatho** would answer that in the affirmative. Her argument? The learned counsel has searched through the lower tribunal record, and she is convinced that the late Selemani Saidi Mkwavila bequeathed his business frames No. 5 and No. 35 to the Late Twalibu Saidi Mkwavila. Ms. Sabatho went on to refer this Court to **Rule 23 of Local Customary Law Declaration Order No. 4 of 1963 (GN No. 436 of 1963)**, and an esteemed Academic Work **Tenga and Mramba** (supra).

With due respect to the learned counsel, Ms. Sabatho the main controversy here is existence of the Will in the first place. Moving on to argue on application of the Customary Law Declaration Order is tantamount to crossing the river before reaching it.

Mr. Songea had forcefully argued that argued that Exhibit P2, claimed to be a will, produced, and relied upon by the appellant at the trial tribunal

was not a valid will since it lacked the essentials of a valid will, namely, a date when it was constructed and signatures of the persons who witnessed it when it was signed by the said Selemani Said Mkwavila. I expected Ms. Sabatho, in her rejoinder, to confront this argument head-on. Unfortunately, she has chosen to go to step two before completion of step one.

Premised on the above, I have to agree with the learned Chairman of the Tribunal that both parties to a suit cannot tie. The case he referred is worth quoting: **Hemedi Said v. Mohamed Mbilu [1984] TLR 113 thus:**

*"According to law both parties to a suit can not tie, but the person whose evidence is heavier than that of the other is the one who must win."*

As alluded to earlier there is no dispute that the respondent is acting legally as an administrator of the estate of her late father. A Will, properly framed, would have prevented her from undoing what the late Selemani had wished. In the context used here a will, often referred to as a "last will and testament," is a legal document that outlines an individual's wishes regarding the distribution of their assets and the appointment of guardians for dependents after their death.

The development of wills can be traced back to **ancient civilizations** and has evolved over time to become an integral part of the legal framework. Although there are no hard and fast rules on how a last will and testament should look like, the following elements are absolutely essential. 1. **Testamentary Capacity:** The testator must possess the mental capacity to understand the nature and consequences of creating a will. 2. **Intent:** The testator must demonstrate a genuine intention to create a will, thereby

dictating how their estate should be distributed after their death. **3. Age Requirement:** The testator must generally be of a certain age, typically 18 years or older, to create a legally valid will. **4. In Writing:** A will must be in writing to be legally enforceable. Oral or “nuncupative wills” are rarely accepted. **5. Signature:** The testator is usually required to sign the will in the presence of witnesses. This signature serves as an acknowledgment of the document's validity and the testator's intent. **6. Witness:** Witnesses act as impartial individuals who can attest to the testator's mental competence and the voluntary nature of their decision. **7. Signatures:** signatures of the testator and the witnesses are usually accompanied by an indication on where and when the will was signed.

It is unfortunate that although the purported will in the matter at hand falls short of the above general requirements including the date in which it was made, the learned Magistrate at Lisekese Primary Court went ahead and certified it as a true copy of the original. He even affixed the Court's stamp making it look like it has been “endorsed” by the honourable court. I must admit that “originality” as used in the sense of certifying documents is independent of the quality of the document itself. Nevertheless, proprietary of the bench holder requires rethinking when it comes to attesting documents that may find their way in Courts of law.

My Brother Hon. Lameck J. in **Haruna s/o Chakupewa v. Patrick s/o Ntalukundo, (PC) Civil Appeal No. 10 of 2021** had the following to say:

*“...the second agreement brought some confusion in the matter making it important to summon the magistrate as a witness. But I*

*think the District Court refrain to do so to avoid embarrassment to the magistrate and the court. And if I were to add a word for future guidance, I could say this; magistrates are commissioners for oath. In their capacity as commissioners for oath, they can attest affidavits and documents. Attestation of documents includes sales agreements, but I think, this should be left to advocates to avoid future embarrassment to the magistrate and the court. Magistrates should say, no thanks, for it is very embarrassing for a magistrate to be subjected to cross examination with an element of dishonest on a document he had signed and affixed a court seal. It is better to stay aside. Their role, in my view, when it comes to documents, other than affidavits, should be limited to certifying them as true copies of the original."*

A will, as a tool for estate planning, is a very serious documents. Legal historians tell us that it traces its origin to ancient civilization in Egypt where the Pharaoh decided, ahead of their demise, how they wished their wealth to be disposed of. The practice found favour in early Christian Tradition incorporating some elements of Roman Law. African communities still practice oral or nuncupative wills. Given the weight that our legal tradition places on wills, a learned counsel stands a better chance of avoiding embarrassment by advising his/her client that it is better to have no will at all than a questionable will.

All said and done, I allow the appeal. Since parties are members of the larger **MKWAVILA** family, make no order as to costs.

It is so ordered.



*E.I. Laltaika*  
**E.I. LALTAIKA**  
**JUDGE**  
**30/5/2023**

**Court**

Judgement delivered today under my hand and the seal of this court this 30<sup>th</sup> day of May 2023 in the presence of Ms. Anastazia Minja, learned Counsel for the Respondent and the appellant in person.



  
**E.I. LALTAIKA**  
**JUDGE**  
**30/5/2023**

**Court**

Right to appeal to the Court of Appeal of Tanzania fully explained.



  
**E.I. LALTAIKA**  
**JUDGE**  
**30/5/2023**