

**IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM**

P.C. CIVIL APPEAL NO. 155 OF 2003

*(From the Decision of the District Court of Kinondoni in Civil
Appeal No.21 of 2003 Makwandi RM)*

**KINOEDI ALAWI MKWANDA
& 2 OTHERSAPPELLANTS**

VERSUS

MWANAHAWA ALAWI MKWANDA.....RESPONDENT

*Date of last order – 12/6/2006
Date of Judgment – 23/8/2006*

J U D G M E N T

A. Shangwa,J.

This appeal is against the decision of the District Court of Kinondoni in Civil Appeal No. 21 of 2003 in which Makwandi, RM upheld the decision of the Primary Court of Magomeni in Probate and Administration cause No. 179 of 2002.

The appellants raised three grounds of appeal against the decision of the District Court. These are as follows:

1. That the District Court erred both in law and fact in holding that exhibits "A" and "B" were genuine and authentic documents and hence properly admitted as evidence.
2. That the District Court erred both in law and fact in holding that the disputed house No . 52 J situate at Manzese Darajani was constructed jointly by the deceased and the respondent while there is no evidence to that effect.
3. That the District Court erred both in law and fact in holding that exhibits "A" and "B" transferred ownership of the house and plot in dispute from the deceased to the respondent.

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The appellants were represented by Mr. Ndazi, Advocate and the respondent was represented by Mr. Kihozya, Advocate. Both counsel argued this appeal by way of written submissions. The parties themselves are blood relatives. The appellants are the brothers of the respondent Mwanahawa Alawi Mkwanda.

The facts of this case are as follows: On 24th April, 2003 , Mrs M.F. Luanda, PCM appointed one Rashid Alawi Maulidi to be the administrator of the estate of the late Alawi Hassani Mkwanda who died on 12/2/1997. At the same time, she observed that the house at Manzese Darajani within Dar es Salaam city namely house No.52 J and the plot at Picha ya Ndege at Kibaha, Coast Region are the properties of the respondent which were given to her by the deceased before his death.

By so observing, she relied on two documents which were tendered in Court as exhibit "A" and "B". The appellants who are some of the heirs to the deceased's estate were not contented with her observation. They took up the matter to the District Court of Kinondoni where they lodged their appeal saying that the Primary Court Magistrate erred in law by relying on the purported will namely exhibits "A" and "B" as evidence that the house at Manzese and the plot at Picha ya Ndege are the properties of the respondent which were given to her by the deceased during his life time.

Their appeal to the District Court of Kinondoni was unsuccessful. Makwandi, RM who heard and determined their appeal held that exhibits "A" and "B" are genuine and authentic documents which transferred ownership of the house and plot in issue from the deceased to the respondent and that there is evidence to show that the house in issue was constructed jointly by the deceased and the respondent

and that therefore the Primary Court Magistrate decided correctly by relying on the will which was witnessed by more than two witnesses.

The general question to be determined by this Court is whether or not house No.52 J at Manzese Darajani and the Plot at Picha ya Ndege, Kibaha are part of the deceased's estate which have to be distributed to his heirs by Rashid Alawi who was appointed as administrator of his estate.

To begin with, I will deal with the second ground of appeal in which the appellants are faulting the District Court's finding that there is evidence to show that house No.52 J at Manzese Darajani was constructed jointly by the deceased and the respondent. As a matter of fact, the District Court did not err in so finding. There is evidence on record to show that the said house was jointly constructed by the deceased and the respondent. Such evidence is

contained in exhibit "A" in which the deceased categorically states so in the following Kiswahili words:

"...Nyumba niliyojenga na Mwanangu Mwanahawa
D/O Alawi Hassan Mkwanda".

Translated into English those words would read as follows:

" The house which I constructed jointly with my
daughter Mwanahawa Alawi Hassan Mkwanda".

In her testimony, the respondent told the trial Court that the house in dispute was given to her by the deceased prior to his death. This is another piece of evidence which the District Court relied upon in its finding.

Before proceeding to the rest of the grounds of appeal, I would like to comment a little bit on exhibit "A" and "B" which were referred to by both lower Courts as the deceased's will. In my view, none of these documents

qualifies to be referred to as a will. First of all none of these documents bears the word will as its heading. The heading on exhibit "A" reads in Kiswahili as follows:

" HATI YA KUMILIKISHA NYUMBA"

The literal English translation of those words is as follows:

' THE DOCUMENT TO TRANSFER OWNERSHIP OF
A HOUSE '

Exhibit "B" which has no heading at all has nothing in it to be construed as a will in which the deceased can be interpreted as bequeathing the plot at Picha ya Ndege to the respondent. This document simply shows that prior to his death, the deceased gave that Plot to her in the presence of three witnesses namely Ally Hamisi Kingalu, Halima Ramadhani Tuwa and Ray J. Mndeme .

I therefore agree with learned counsel for the respondent Mr. Kiozya of Ganrichie and Co; Advocates that exhibit "A" and "B" do not have any features of a will . Referring to these documents as a will as both lower Courts did is completely wrong. These are mere documents which show that the deceased gave the house at Manzese and the Plot at Picha ya Ndege to the respondent Prior to his death.

I now turn to the first ground of appeal in which the District Court is faulted for holding that exhibit "A" and "B" are genuine and authentic documents. Learned counsel for the appellants contended that both documents are not genuine and authentic. He gave two reasons for his contention. One, that exhibit "A" is a forged document as it shows that it was thumb printed by the maker on 10/4/1995. But it reads that with effect from to day 10/6/1995 house No. 52 J Manzese Darajani is the Property

of the respondent. Two, that exhibit "B" lacks the signature of the maker.

For me, I think that both documents are genuine and authentic. Exhibit "A" is not a forged document as contended by learned counsel for the appellants. Notwithstanding the fact that exhibit "A" indicates that with effect from 10/6/1995 house No. 52 J Manzese Darajani is the property of the respondent while it was thumb printed by the maker on 10/4/1995, I still hold that this exhibit is genuine and authentic. I have the following reasons for so holding. First, the thumb print of the deceased was attested by Mr. H. H. Mtanga who is the Notary Public and commissioner for Oaths. Second, the one who indicated that it was thumb printed on 10/4/1995 is not its maker (the deceased). It is Mr. H.H. Mtanga Advocate. Third, the deceased who is its maker was an illiterate person who did not know how to read and write. Coming to exhibit "B", it is

true as contended by learned counsel for the appellants that it does not bear the signature of its maker. Despite the said omission, I still hold also that exhibit "B" is genuine and authentic. Although it was not thumb printed by the deceased, it was signed by three witnesses whose signatures are sufficient enough to guarantee its authenticity. All in all, the District Court did not err in holding that exhibits "A" and "B" are genuine and authentic documents.

With regard to the third ground of appeal in which the District Court is faulted for holding that exhibits "A" and "B" transferred ownership of the house and plot in issue from the deceased to the respondent, I wish to state in brief that the said Court did not err in so holding. Both exhibit "A" and "B" do speak for themselves. They signify that prior to his death, the deceased gave house No. 52 J at Manzese Darajani and the plot at Picha ya Ndege to the respondent.

Finally, I conclude by holding that house No. 52 J at Manzese Darajani and the plot at Picha ya Ndege are not part of the deceased's estate. I direct that Rashid Alawi Maulidi who was appointed by the Primary Court of Magomeni to be administrator of the deceased's estate should not touch them.

For the reasons I have given in this judgment, I hereby dismiss this appeal. I do so with costs.

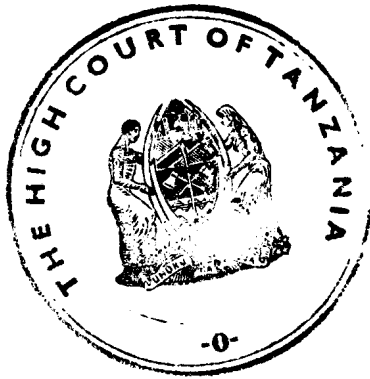



A. Shangwa,

JUDGE

23/8/2006.

Delivered in open Court this 23rd day of August, 2006.




A. Shangwa,

JUDGE

23/8/2006