LYSON LAW GROUP
Advocates & Legal Consultants

MAKING A VALID WILL IN TANZANIA
SUCCESSION AND ESTATE PLANNING LAW

Part II

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LAWS GOVERNING THE MAKING OF WILLS AND TYPES OF WILLS IN TANZANIA

The Tanzanian succession law adopts a plurality of laws with regard to the Admiration of estate recognized under our Constitutional edifice and among the laws are: the Probate and Administration of Estates Act, Cap 352 R.E, 2002, the Indian Succession Act, 1865, Administrator General (Powers and Functions) Act, Cap 27 RE, 2002 ,the Judicature and Application of Laws Act, Cap 358 RE,2019, The Succession (Non-Christian Asiatic) Act Cap 28 R.E, 2002 , the Customary Law (Declaration) Order No 4, 1963 and the Probate Rules , Cap 352 R.E, 2002 among other statutes.

Upon the death of a person all transmissible rights and obligations are transferred to their successors, this is normally effected out of their estate and is precisely where a Will comes in. Among the various types of Wills are Oral Wills on the one part and a Written Will respectively:

AN ESTATE

The Black Law Dictionary defines an Estate as, the amount, degree, nature, and quality of a person's interest in land or other property, especially, a real estate interest that may become possessory, the ownership being measured in terms of duration.

An estate is a key part of succession. The term estate refers to aggregate of a person's property instantaneously owned preceding their death. In determining a person's estate all his liabilities should be included. The fact that money is payable only after a person's death is not in itself sufficient to exclude it from his estate immediately before his death.

VALIDITY OF A WILL

The making of a will is a vitally important act, with extensive legal consequences. As a matter of common sense and practical impossibility, when a person dies, they cannot go with their properties. So, having a valid will is one of the few ways in which one can bequeath his Estate to his chosen successors. Usually, a Will is valid if it fulfils the following key requirements:

WHAT ARE THE VARIOUS TYPES OF WILLS?

Tanzania like any other state sets its requirements for accepting Wills as valid. Usually, executors must prove the testator intended to use the document as a will. However, without any witnesses, family members or beneficiaries may challenge their validity. In this case therefore compliance with the legal requirement for a Will are of primary importance.

I. Oral Will

An oral will is also called nuncupative will is a kind of a will where the wishes of the one making the will (the testator) are not in a written form, the testator only express his wishes verbally to the available witnesses on how his properties shall be distributed upon his/her death. Oral wills are typically used in emergency situations when a written will is not feasible, such as on a battlefield or during a serious illness and they are generally subject to strict legal requirements including four witnesses. Oral will have customarily been practically used to accommodate Illiterate people who are unable to read and write.

II. Written Will

This is the kind of will where a testator's wishes are put in a written form signed by him/her and witnesses who know how to read and write and who saw the testator affix his signature on the document. Under this category it is important for the will to be written by a permanent ink.

SALIENT CONSIDERATIONS WHEN DRAWING A VALID WILL.

1

Age

Wills are generally executed by a legal adult who is of sound mind, and estate planners call this person the "testator". In Tanzania in order for a person to make a will must be of legal age. The law considers a person to have a legal capacity if has attained 18 years of age. In that sense, a minor is legally not allowed to make will and the will that will be executed by a Minor shall be invalid hence, incapable of being enforced.

2

Testamentary Capacity

By the time a person embarks on making a will he/she must be capable of understanding and forming a rational judgement over the act so done. To have mental capacity, the testator must have the ability to know the nature/extent of property, the physical description of the property, the disposition being made by her will and have the ability to connect all of these elements together to form a coherent plan. This being the case, a will is invalidated if a testator is of unsound mind, illness, and is under the influence of alcohol when making the will or suffers from a sudden angry animus.

SALIENT CONSIDERATIONS WHEN DRAWING A VALID WILL.

3

Intention

In the Will making process intention is of the essence. A person is said to have intended to make a Will if at the time of the signing, he or she intends to make an irrevocable disposition of property in the event of his death. The testator must have the intention when he executes the will. More specifically, the requirement is that the testator must have intended that his wishes as expressed in the appropriate form should take effect on his death. It follows that these wishes must be entirely the result of his volition. The testator must have the presence of mind when making his will. Intention can be overruled should factors such as fraud, mistake, undue influence be proved later.

4

Proper Disposal of Property

A Will must properly dispose-off the testator's property without abrogating the above stated principles. This includes listing all property and assets and properly distributing them among beneficiaries/heirs according to the testator's wishes while considering the law of the state. Also, the properties that do not belong to the testator should not be included in the will. "You cannot give what is not yours."

SALIENT CONSIDERATIONS WHEN DRAWING A VALID WILL.

5

Signed, Dated and Witnessed

A Will must be signed and dated by the testator in front of competent witnesses numbering two (2), who must also sign. If the testator is illiterate the written will must be witnessed by four adult persons, two of them must be relative of the testator who are not beneficiaries of the testator's estates.

THE PRINCIPLE

"YOU CANNOT GIVE WHAT IS NOT YOURS (NEMO DAT QUOD NON HABET RULE)"

This is a cardinal principle that is applied in the course of preparing a Will. The principle should be at the back of the mind of the testator while listing the properties that should be included in the Will.

The principle requires that, one should not put anything in a Will which does not belong to him exclusively. As a general rule some of the properties that should not be included in the Will are properties that are owned jointly (joint tenancy) or properties that are owned by another person. That being the case, if for instance the property is owned in common (tenancy in common), the testator must only bequeath their shares of the property and not the entire property.

I. Exceptional Circumstances where jointly held Property May Devolve to another Party through a Will.

Joint-Occupiers vs Tenancy-in-Common.

Joint-Tenancy has the right of survivors (jus accrescendi), meaning that where a party dies the property rights survives them and therefore passes on to the other living party and can therefore not be passed through a will.

On the other hand, where there is a tenancy in common, a testator can bequeath shares in the property as part and parcel of their estate and valid/indefeasible title in such property will pass to the heirs .

II. What if one dies without leaving a Valid Will (Intestate)?

Intestate succession is a legal process that comes into play when someone passes away without leaving behind a valid will or other legally binding document dictating how their assets and property should be distributed. Instead, the distribution of assets is determined by the laws of intestacy in the state where the person passed away **(Lex Domicili)**

Under the circumstance the family oversees appointment of the administrator/administratrix of the estate to collect, administer and distribute the estate of the deceased subject to the resolutions agreed upon by family members in the meeting. This part will be well covered in our next article regarding the process of obtaining letters of administration or probate letter for the Executor and the Administrator of the estate.

CONCLUSION

Why should you have a Lawyer to prepare your Will?

The main reason that most people should consider hiring an Advocate or Law Firm to create their last will and testament is that this is a crucial step to take, and even a small mistake can create massive headaches for your loved ones in probate Court. To make sure that a Will is well drafted so as to avoid unnecessary objections in Court, it is advisable for Advocates to be involved in the process of drafting the Will.

Customary law is equally worthy of mentioning at this point with some curious observations, because for instance extraneous circumstances may exist allowing a testator to disinherit a heir among the circumstances which are also not homogenous across all communities are where the presumed heir commits adultery with the wife of the testator or where the same presumed heir attempts to kill the testator among other reasons.

A concept known as conflict of laws will normally handle the choice of law debate/question depending on the ethnic origin of the deceased, their wishes as expressed when still alive, customs, and way of life, religion professed during their lifetime among other key considerations which is best left to a lawyer to handle in detail and with precision.

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