DRAFTING OF A WILL IN TANZANIA

1. **INTRODUCTION**

Will is a statement, which is voluntarily made by a person during his lifetime to explain his intention on how his property shall be distributed upon his death. A Will can be of two types: An **oral Will** and a **written Will**.

An oral will is a type of a will where the wishes of the testator (the one making the will) 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. While in a written will the testator 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.

2. **IMPORTANCE OF MAKING A WILL**

Generally, your Will tells everyone what should happen to your money, possessions, and property (your estate) after you die. If you don't leave a Will, the law will decide how your estate is passed on, something which may not be in line with your wishes. A properly executed will allows you to specify exactly how you would like your estate handled upon your death, including how and to whom the property should be delivered, who should watch over your minor children (if any), and who should manage the administration of your estate. A will makes it much easier for your family or friends to sort everything out when you die, without a will the process can be more time consuming and stressful.

3. **WHAT SHOULD A WILL CONTAIN?**

- As a writer of the will, or testator, you must be at least 18 years of age.
- You must have testamentary capacity, and must state in writing that you are of sound mind and are writing the will of your own accord.
- A statement declaring the document as your will must be included.
- An executor should be appointed.
- The document must contain at least one provision that names a personal guardian for a minor child and/or at least one provision providing for the allocation of your estate.
- If the will is not written in your handwriting (i.e., typed), you must sign the will and it must be attested to by witnesses who are not beneficiaries and who saw the will signed by you.

4. **VALIDITY OF A WILL**

The making of a will is a vitally important act, with far-reaching consequences. Since you cannot “take it with you” when you die, having a valid will is one of the few ways you can give back to those you love in a proper, legal manner. Generally, a will is not valid unless it fulfills the following requirements.

- **Legal age**

A person must be of legal age to make a will. In Tanzania the law considers you to have legal capacity to create a Will if you are 18 years of age or older.

- **Testamentary Capacity**

The person has ‘testamentary capacity” if he has a sound mind, meaning the testator must know that he or she is making a will and its effect; understand the nature and extent of the estate; and understand that he or she is disposing of property and assets.

- **Intent**

A person has intent to make a Will if at the time of the signing, he or she intends to make a revocable disposition of property in the event of his death.

- **Voluntary**

A Will must be voluntarily entered into and signed by the testator. A will executed by a person who was coerced into signing the will, or who signed the will under duress, or undue influence is not considered to be a valid will.

- **Proper Disposal of Property**

A Will must properly dispose of the testator’s property. This includes listing all property and assets and properly distributing them among friends and family according to the testator’s wishes.

- **Appointment of executor**

A Will must name an executor. This is a person who will oversee your assets after you die and will make sure that your wishes set out in the will are followed. Is the one who is responsible for safeguarding your assets and administering any trust which you set up under your Will. The executor will be responsible for distributing all your assets to the

beneficiaries

- **Signed, Dated and Witnessed by Two persons who are not beneficiary**

A Will can be handwritten on a single piece of paper or elaborately typed within multiple pages, depending on the size of the estate and preference of the testator. It must also be signed and dated by the testator in front of two competent witnesses, who must also sign. If the testator is illiterate the written will must be witnessed by four persons, two of them must be relative of the testator.

5. **DISTRIBUTION OF ESTATE UNDER TESTACY AND INTESTACY**

Whenever a person dies leaving property, the question will definitely arise as to how his property or estate will be dealt with by those he/she left behind. A person is normally said to have died testate if he left a Will at the time of his/her death and a person is said to have died intestate if such a person died without leaving a Will. When a person dies testate, things are a bit easier since all that his/her Personal Representative (executor) will do is to apply and obtain a grant of Probate which merely validates his Will and allows the Personal Representative/Executors to carry out or effectuate the wishes of the testator e.g. distributing the property according to the wishes of the testator. However, where a person died intestate, his personal representative will apply for Letters of Administration to deal with his estate, which might be a bit complex, hence the imperative to write or make a Will.

6. **REVOCATION & AMENDMENT OF A WILL**

A will is ambulatory, which means that a competent testator may change or revoke it at any time before his/her death. Revocation of a will occurs when a person who has made a will takes some action to indicate that he no longer wants its provisions to be binding and the law abides by his decision. Revocation can be in respect of the properties distributed, appointed executor, or the beneficiaries. For revocation to be effective the intent of the testator, whether express or implied, must be clear, and an act of revocation consistent with this intent must occur. Persons who wish to revoke a will may use a codicil. A codicil is a document that changes, revokes, or amends part or all of a validly executed will. When a person executes a codicil that revokes some provisions of a previous will, the courts will recognize this as a valid revocation. Likewise, a new will that completely revokes an earlier will indicates the testator’s intent to revoke the will. Sometimes revocation occurs by operation of law, as in the case of a marriage, divorce, birth of a child, or the sale of property devised in the will, which automatically changes the legal duties of the testator.

7. **IMPLICATIONS**

The laws applying to inheritance in Tanzania are the Magistrate Court Act, Cap 11 (5th schedule), the Probate and Administration of Estates Act (Cap 352) ("PAE"), The Local Customary Law (Declaration) (no.4) Order of 1963 ("LCL"), and the Islamic Law Restatement Act (Cap 375) ("ILR"). The law applicable to foreigners is normally the PAE, based on the principle of "*lex situs*" i.e. the applicable law is that where the inherited property is located. This law cuts across religions and nationalities provided that the property to be administered is located in Tanzania. (The ILR applies only if the deceased was of the Islamic faith). If the spouse of a foreigner is a Tanzanian citizen who owns real estate in Tanzania, then his/her succession is governed by Tanzania law, and not by the law of the foreign spouse. The High Court of Tanzania is the only court vested with jurisdiction over probate and administration issues concerning foreigners, regardless of the applicable law.

- **FOREIGNERS ARE RESTRICTED FROM INHERITING AND OWNING LAND IN TANZANIA**.

Foreigners can only own land in Tanzania if they are investors registered with the Tanzania Investment Centre ("TIC"). Under section 20 of the Land Act, investment status may be granted to any person, company, or group of persons (whether or not formed into a corporate body). The land rights granted to foreign investors derive from the TIC. Upon death or insolvency of the foreign investor, the land rights revert back to the TIC; however a foreigner or foreign company with land rights from the TIC can bequeath shares in the land (subject to any pre-emption clauses which may exist in the Articles of Association of the Company). The Land Registration Act does not prohibit a foreigner from being a legal personal representative of the deceased, who can administer an estate comprising land located in Tanzania under the powers of a court decree.

- **ADVOCATES ARE NECESSARY.**

Advocates are necessary in Tanzania to draw up legal documents, including wills, and to deal with legal disputes in court, for example by representing or defending the petitioner if there is an objection to the granting of either probate or the letters of administration. The nature and extent of the advocates´ participation depends on the wishes of the parties involved. Although the process may be simple and straightforward, parties usually prefer to engage legal counsel as a result of the technical nature of the laws and procedures in legal proceedings. If there is no will, an administrator must be appointed. In the absence of a will,

an administrator must be appointed by the heirs of the deceased at a clan meeting. It is the duty of the administrator to petition the Court. The petition must be accompanied by a number of documents:

- Minutes of the clan meeting, to show that the heirs have consented to and entrusted the administrator to administer the estate;
- The death certificate of the deceased;
- An affidavit as to the domicile of the deceased person, sworn by the administrator, or one of the heirs;
- Surety bonds executed in favor of the elect administrator, confirming that he will administer the estate honestly.

On hearing the petition, the Court normally grants the letters of administration, unless fraud or foul play is discovered surrounding the preliminary procedures (for example, fabrication of the minutes of the clan meeting, or impropriety in conduct or reputation of the elected administrator).If there are no heirs, the estate falls to the Tanzanian government, under the appointed Administrator-General. If there is a will, an executor is needed to petition the Court.

If the will does not name an executor, it only serves to define the wishes of the deceased on how the estate should be devolved, and the procedure followed is the same as if there was no will, as described above. If the will names an executor, it is the duty of the executor to petition the Court to probate the will. This Petition is accompanied by

- a copy of the will;
- an affidavit to prove the domicile of the deceased;
- Surety bonds, to be executed if the will is contested.

The estate of the deceased is then placed by a Court order under the charge of the executor, and the estate must be distributed according to the will.

The administrator of the estate, or the executor of the will, only becomes the legal personal representative of the deceased after registration with the registrar of titles at the land registry. The legal personal representative has powers to sell or lease the landed property for the interests of the heirs. Therefore a foreigner (e.g. the spouse of a Tanzanian citizen) who inherits an estate in Tanzania and who is also appointed as an administrator/executor and registered as a legal personal representative can sell the property in that capacity and realize the proceeds.

8. **THE BEST COURSE OF ACTION IS TO MAKE A WILL.**

It is advisable for a foreigner with assets in Tanzania to make a local will. This ensures that the High Court has the necessary guidance to carry out his/her wishes, and it minimizes the time required to administer the estate. In the absence of a local will, the administration of the estate may take a long time, and the wishes of the deceased may not be followed. A local will can be made under Common Law, before a notary public. The testator can choose to have other witnesses, instead of the notary public. To have the force of law, such a will must be registered in Tanzania under the Registration of Documents Act, Cap 117, otherwise it is invalid.

A will can also be made in Tanzania following the Local Customary Law. An oral will is made in the presence of not less than four witnesses, two of whom must be relatives of the testator. If the witnesses die before the testator, another will must be made. If the number of serving witnesses is reduced to two, the will is canceled, and the estate is administered as if the deceased died intestate. A written will is made by a literate testator in the presence of two witnesses, one of whom must be a relative. If the testator is illiterate, the will is made in the presence of four witnesses, two of whom must be relatives. The will must be written in ink, and signed or thumb stamped by the testator.

9. **PROPERTY CAN BE GIFTED DURING THE LIFETIME OF THE OWNER.**

The testator is free before death to donate any or all of his/her assets in Tanzania to anyone through a deed of gift based on natural love and affection. If the donor is married, then his/her spouse must consent to the transfer of a matrimonial home. Once the title to the gift has passed to the transferee, such transfer cannot usually be challenged, unless there are suggestions of fraud or other foul play. There are no compulsory heirs or reserved portions.

Problems arise if there are many potential heirs when no will exists to set out the rights of the heirs over the estate of the deceased. Since there are no compulsory heirs or reserved portions in Tanzania law, conflicts may arise between the spouse, the children, and the clan members of the deceased as to how the estate is distributed. This problem might apply to a foreigner with a Tanzanian spouse who owns property in Tanzania. In such cases, the Court decides, for the interest of justice, how the estate should be distributed for benefit of all the heirs.

10. **PROPERTY CAN PASS TO MINORS.**

If property in Tanzania is to be bequeathed to minors (under 18 years), or persons of unsound mind, then the will should specify how their inheritance is to be administered (and by whom) pending their reaching the age of majority, or becoming well enough to deal with the property. If the Court finds that for any reason the executor or administrator of the will is unable to administer the bequeathed property in the interest of such a beneficiary, then it may direct that the estate of the deceased be placed for a period of time under the care of the Administrator-General.