



# TESTAMENTARY FREEDOM IN TANZANIA

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## INTRODUCTION

The freedom to give property to another or to withhold it is known as testamentary freedom. The Doctrine of testamentary freedom is the principle of succession law which empowers the testator of a will to have unlimited freedom to bequeath his estate to whomever person is pleased or to disinherit any person including his own family members who are related to him by blood, marriage and adoption. This means a person is free to dispose of his properties however and to whomever he wishes in his will.

This has been the position in Tanzania as provided under section 46 of the Indian Succession Act, No.10 of 1865 which gives freedom to every person of sound mind and of majority age to dispose his property by his last will. There is no provision in the Indian Succession Act, 1865 or in any other written law around Tanzania which expressly imposes any limitations to or dictates the testator to mandatory terms for him to bequeath his property by his Last will to persons he is related to by blood, marriage or adoption.

## LEGAL REQUIREMENTS FOR TESTAMENTARY FREEDOM

There are legal requirements that a testator is required to fulfill to enjoy the testamentary freedom. These includes:-

1. To possess the testamentary capacity by exhibiting soundness of mind
2. Being at age of majority at the time of making the last will and testament

## LIMITATIONS TO TESTAMENTARY FREEDOM

In Tanzania, it is the rigidity of this legal regime that has inspired His Lordship, Mlyambina J, to modify the doctrine of testamentary freedom which sounds unfair and unjust by highlighting the exceptions of the doctrine through the Probate and Administration Cause No.39 of 2019 between Benson Benjamin Mengi and Others versus Abdiel Reginald Mengi and Another.



His Lordship, Mlyambina J, modified the 'Absolute Testamentary Freedom Doctrine' and introduced the 'Restrictive Testamentary Doctrine' which empowers the testator to bequeath as he wishes but subject to the following limitations;

1. When there are assets jointly acquired by the testator and his spouse, the testator shall have no power to make testamentary disposition in the share of the surviving spouse.
2. Testamentary power shall be limited by Statutory Heirs Rules (must bequeath to his biological or whoever depended on him prior to his death and adoptive children).
  - Testator must have legal capacity to make testamentary disposition through his last will ( Must be of sound mind and attained age of majority)
1. Any testamentary bequest must be in line with public policy of Tanzania and must be non-discriminatory
2. Any testamentary bequest must be in accordance with positive laws of Tanzania.

## **CIRCUMSTANCES FOR DIS-INHERITANCE UNDER TESTAMENTARY FREEDOM**

Notwithstanding the legal obligation of the testator to compulsorily bequeath part of his estate to his children and spouse under the statutory law, yet as exceptions to general rule on testamentary obligation, the testator is now entitled to disinherit his child or spouse in the following circumstances:-

1. Where the son or daughter of the testator commits adultery with a spouse of the testator.
2. Where the spouse commits adultery with son or daughter of the testator.
  - Where a son, daughter or spouse attempts to murder the testator or his spouse.
1. When the son, daughter or spouse neglects to look after testator in hunger, sickness or old age without justifiable reasons.
2. Mistreatment of testator by words or deeds.
3. When the son, daughter or spouse by fraud, violence, intimidation or undue influence causes a testator to make or change a will.
  - Any other ground as the court may determine to be sufficient cause.



## **CONCLUSION.**

Generally, a will is not valid unless it fulfills the following requirements; must be voluntarily entered into and signed by the testator of a legal age, must properly dispose of the testator's property, must name an executor and must be signed, dated and witnessed by two persons who are not beneficiaries.

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 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

Hence, regardless of the testamentary freedom, a will must be valid, and the wishes of the testator must be respected and implemented by the court, executor, administrator and heirs generally.