

IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

CORAM: MUSTAFA, J.A.; MAKAME, J.A. And OMAR, J.A.

CIVIL APPEAL NO. 8 OF 1986

AMINA RASHIDI. APPELLANT

VERSUS

1. MOHINDER SINGH. 1st RESPONDENT
2. ALWI SHARIFF. 2nd RESPONDENT

(Appeal from the Decision of the
High Court of Tanzania at Arusha)
(Chua, J.) dated the 11th day of
July, 1985

in

Civil Application No. 66 and 65 of 1985

D E C I S I O N

MUSTAFA, J.A.:

This matter arose from a Probate and Administration Cause No. 16 of 1983. Anand Singh died and by his will appointed one of his sons, Mohinder Singh as his executor. Probate was granted to Mohinder Singh on 2.2.1984.

One Amina Rashidi was apparently living with the deceased Anand Singh before Anand Singh died. Two children were born during such association, and these two children were minors, and had been included in the list of beneficiaries to the estate along with other issue. Amina Rashidi was not a beneficiary, but she was the guardian of the two minor children born to her.

Sometime in May, 1985 in Miscellaneous Civil Application No. 65 of 1985 Mohinder Singh, the ~~executor~~, applied for an injunction to issue in the High Court restraining Amina Rashidi from intermeddling with the estate, among other prayers. The application was

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successful and the court issued the necessary orders on 11.7.1985.

Two other beneficiaries, Ardensina and Chausiku in or about November, 1984 filed an application in the High Court concerning the alleged intermeddling by Amina Rashidi in the estate and an order for sale of a property, a building on Plot 19, Block G, Area F, Arusha was made as a result by the High Court.

The said plot 19 was duly sold to one Alwi Shariff for Shs. 450,000/- and the proceeds were distributed or to be distributed to the beneficiaries under the will. The sale to Alwi Shariff was sanctioned by the High Court.

It appears that Amina Rashidi was occupying the building on Plot 19 purchased by Alwi Shariff. Alwi in Miscellaneous Civil Application No. 66 of 1985 sought and obtained an eviction order in the High Court against Amina Rashidi, and Amina was duly evicted. The eviction order was dated 11.7.85.

Then it would seem that Amina Rashidi had filed an application supported by an affidavit on or about 10.7.85 to set aside the sale of Plot 19 and for permission for her to purchase on a re-sale. That application Miscellaneous Civil Application No 67 of 1985 is still pending.

Amina Rashidi has filed an appeal, in fact two appeals which apparently were consolidated, into one. It is a vague appeal, and is not clear so far as the grounds of appeal are concerned. It would seem that Amina Rashidi was seeking a reversal of the order of the High Court granted to the executor Mohinder Singh on 11.7.85. It was an application restraining Amina Rashidi from intermeddling with the estate. The other **prayer** would appear to be for a reversal of the order of the High Court confirming the sale of the building on Plot 19 to Alwi Shariff. The grounds advanced were that the High Court

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had made the orders in the absence of Amina Rashidi, after the advocate representing her had withdrawn with leave of the court. The other ground was that Amina Rashidi was not notified of the sale of Plot 19.

Now the orders of the High Court Amina Rashidi seeks to overturn were made on 11.7.85.

Mr. D'Souza and Mr. Mrema for the respondents Mohinder Singh and Alwi Shariff have filed preliminary objections. Mr. D'Souza submitted that the notices of appeal were filed out of time, in fact filed after 42 days instead of 14 days in terms of Rule 76 of the Court of Appeal Rules. To that Mr. Rutashobya for Amina stated that Amina knew of the High Court order on 9th August, 1985, and had filed the notice of appeal on 23rd August, 1985, in time. There is no affidavit filed by Amina that she had come to know of the High Court order on 9th August, 1985; that statement was merely contained in the notice of appeal itself.

Mr. D'Souza's second objection was that the certificate under Rule 83 (1) of the Court of Appeal Rules concerning the time taken for preparation and delivery of the copy of proceedings was ineffective as the provisions in Rule 83 (1) and Rule 83 (2) were not complied with. To that objection Mr. Rutashobya submitted that Amina Rashidi was not legally represented and that she had been improperly abandoned by her advocate, one Mr. Kinabo. After the abandonment Amina Rashidi was seeking the aid of the Law Society and the Dar es Salaam University Legal Aid Committee, which rendered help to her.

Another objection was that leave to appeal in terms of Section 5 (1) (c) of the Appellate Jurisdiction Act from the High Court was not sought or obtained. Without such leave

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the appeal is incompetent. Mr. Rutashobya trotted out the same excuse as before, that Amina Rashidi was abandoned by her counsel. He could not explain why no application was made to obtain such a certificate out of time after legal aid was given to Amina Rashidi on or about 23.8.85.

Another objection raised was that the provisions of Rule 83(1) (c) and (d) were breached in that no court fees were paid or security for costs furnished and no exemption was applied for or granted in terms of Rule 122 of the Court of Appeal Rules. Mr. Rutashobya could not explain this away except again on the ground that Amina Rashidi was unrepresented.

Mr. D'Souza submitted that the appeal before us is premature because there is an application being Miscellaneous Civil Application No. 67 of 1985 filed by Amina Rashidi and pending before the High Court. That application 67 of 1985 is for the setting aside of the sale of Plot 19 to Alwi Shariff, the same point for which the appeal is before this Court.

On this Mr. Rutashobya made a startling submission. He submitted, on the instruction of Amina Rashidi, that Amina Rashidi did not authorise that application 67/85 to be filed, and that while Amina knew of the contents of the affidavit in general terms, she had not signed the said affidavit nor sworn to it before a commissioner for oaths. He alleged that Mr. Kinabo had acted without authority in filing that application and Mr. Ojare, the Commissioner for oaths had given a false statement that Amina had signed in his presence. Amina alleged that the signature on the affidavit was not hers. In fact she alleged that both Mr. Kinabo and Mr. Ojare, both practising advocates and therefore officers of the court, had perjured themselves.

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We are surprised that Mr. Rutashobya has made these serious and criminal allegations before us, without having first obtained an affidavit from Amina Rashidi to that effect. We would have thought that before Mr. Rutashobya would make these allegations, albeit on behalf of Amina Rashidi, he would have thoroughly investigated the matter to ascertain how true they could be, and certainly not without a supporting affidavit from Amina Rashidi.

Mr. Rutashobya has claimed that Civil Application No. 67 of 1985 was in fact not before the court, as Amina Rashidi was not concerned with it.

Mr. Rutashobya conceded that an essential document, the court order in Miscellaneous Civil Application No. 66 of 1985 in an application by Alwi Shariff for an order of possession of Plot 19 and for the eviction of Amina Rashidi therefrom was absent from the record, but sought to excuse it on the ground that Amina had been abandoned by her advocate and was unrepresented - that was an infringement of the provisions of Rule 89 (1) (g).

The Memorandum of Appeal was filed on 2nd April, 1986 and was objected to by Mr. D'Souza as being vague and imprecise, which it is. Mr. Rutashobya^{has} put forward the general argument that Amina Rashidi was unrepresented. He also submitted that Mr. Kinabo who had at some stage represented Amina Rashidi, had deliberately and improperly let her down. There was the incident concerning the Miscellaneous Civil Application No. 67 of 1985 already referred to. Mr. Rutashobya alleged that on 11.7.85 before Chua, J. Mr. Kinabo misinformed the court on an important matter. Mr. Kinabo was recorded as saying in court

I have been trying to communicate with my client (Amina Rashidi) but have failed. I have informed her this morning that I intend to withdraw from the case. She was present in person in this Court today

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but after I told her that I intended to withdraw from the case she left the court precincts. She did so despite the fact that I told her to appear in person. Under the circumstances I pray for leave to withdraw from this matter".

The court granted Mr. Kinabo leave to withdraw and proceeded to hear the application 65/85 and Miscellaneous Civil Application No. 66/85 ex parte, applications by Mohinder Singh and Alwi Shariff.

Mr. Rutashobya submitted that what Mr. Kinabo told the court was a lie, that Amina Rashidi knew nothing about the matter and suggested that the proper step the High Court should have taken was to have adjourned the hearing of the applications and to ~~have~~^{have} ~~summoned~~ Amina Rashidi. He implied that the judge should have disbelieved Mr. Kinabo. We find Mr. Rutashobya's submission somewhat startling. Again he has made this serious allegation without a supporting affidavit, and it does not appear to us that he has seriously looked into the veracity or otherwise of this incident as narrated to him allegedly by Amina Rashidi.

We are of the view that the High Court judge was perfectly entitled to accept the word of Mr. Kinabo given from the Bar at its face value and to have acted in the way the judge did.

The whole thrust of the appeal would appear to be that as the sale of the ^{building on} ~~plot~~ No. 19 and the order to Amina Rashidi not to intermeddle with the estate were made in the absence of Amina Rashidi, such orders should be set aside to allow Amina to be heard on those applications.

We are satisfied that Amina Rashidi deliberately absented herself from the hearing of the applications after she was informed by Mr. Kinabo that the latter was going to withdraw. We see no reason for acceding to her request.

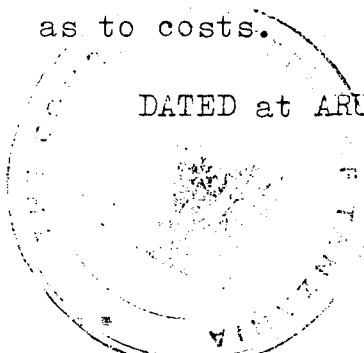
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We think it pertinent to point out that on page 63 of the record filed, paragraph VIII of the affidavit sworn to by Amina Rashidi would give the lie ^{to} her allegation that she knew nothing of the filing and institution of Miscellaneous Civil Application No. 67 of 1985. That affidavit was sworn by Amina Rashidi on 24.6.85.

The objections raised by Mr. D'Sorza to the competency of the appeal are well founded and substantial. In terms of Rule 82 of the Court of Appeal Rules we hold that no appeal lies and we ~~strike~~ off the appeal as incompetent.

As the appellant is on legal aid, we make no order as to costs.

DATED at ARUSHA this 25th day of July, 1986.

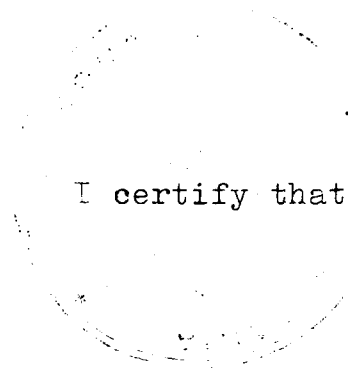


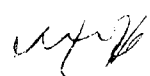
A. MUSTAFA
JUSTICE OF APPEAL

L. M. MAKAME,
JUSTICE OF APPEAL

A. M. A. OMAR
JUSTICE OF APPEAL.

I certify that this is a true copy of the original.




(J. H. MSOFFE)
DEPUTY REGISTRAR.