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

**(CORAM: NSEKELA, J.A., KILEO, J.A. And BWANA, J.A.)**

**CIVIL APPEAL NO. 26 OF 2008**

**AGNESS SIMBAMBILI GABBA.....APPELLANT**

**VERSUS**

**DAVID SAMSON GABBA.....RESPONDENT**

**(Appeal against the decision of the High Court of Tanzania at Dar es Salaam)**

**(Mihayo, J.)**

**dated the 30th June, 2007**
**in**
**Civil Revision No. 74 of 2005**

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**JUDGMENT OF THE COURT:**

20 November, 2008 & 20 February, 2009

**KILEO, J.A.:**

The appellant and the respondent are stepmother and stepson respectively. The appellant was married to the late Samson Gabba who died intestate on 21/05/2005. Prior to his marriage to the appellant, the deceased had begotten the respondent in another union. A brief background of the appeal before us will enable us to better appreciate the issues involved.

Following his father's demise, the respondent applied for letters of administration of the estate of his late father in the Primary Court of Kinondoni. The appellant, being seized of the information of the application, feared that her rights might be jeopardized in the event the respondent was given the letters of administration. She, in the circumstances, retained Law Associates Advocates to take up the matter on her behalf. Since advocates are barred from appearing in the Primary Courts by virtue of section 33 (1) of the Magistrates Courts' Act, Cap 11 R.E. 2002, a letter was written by Law Associates Advocates to the District Magistrate In charge of Kinondoni District, requesting her to transfer the matter from the Primary Court to the District Court so that their client could have legal representation.

When the matter reached the District Court it appears that the probate and administration matter was shelved aside and instead an application filed by the present respondent under Order XXXVII r. (1) and (2) of the Civil Procedure Code, Cap 33 R.E.2002 (CPC) was entertained. Below are the contents of the Chamber Summons:

*IN THE DISTRICT COURT OF KINONDONI DISTRICT*

*AT KINONDONI*

*MISC. CIVIL APPLICATION NO 15 OF 2005*

*DAVID SAMSON GABBA.....APPLICANT*

*VERSUS*

*AGNESS SIMBAMBILI GABBA.....RESPONDENT*

*CHAMBER SUMMONS*

*[Made under Order 37 Rule 1 and 2, Sections 68 and 95 of the Civil Procedure Code and any other enabling*

*provision of the Law]*

*LET ALL PARTIES CONCERNED hereto appear before Hon. KALOMBOLA SRM in Chamber on ..... the day of ....., 2005 at 8.30 O'clock in the forenoon or soon thereafter when the Applicant shall be heard on an application for the following orders: -*

*(a) That this Honourable Court be pleased to issue an interim order restraining the Respondent from collecting and receiving rents from the leased house No. 39 Ursino North and Order that such rents be deposited in Court pending appointment of an administrator of the Estate of the Deceased.*

*(b) Costs be provided for.*

*(c) Any other orders or reliefs this Honourable Court may deem fit and just to grant.*

*This Application has been taken of the instance of Mashiku & Co. Advocates and is supported by the Affidavit of the Applicant – David Gabba and such other grounds as shall be adduced on the hearing date.*

*GIVEN UNDER MY HAND and SEAL of the Court this 27th day of July, 2005.*

_____

*SENIOR RESIDENT MAGISTRATE*

Before the application was heard, counsel for the appellant raised a preliminary objection on the following points:

1) *That the applicant had no locus standi in the matter.*
2) *That the application was bad in law for having been preferred under the wrong enabling provisions of the law.*

A hearing on the preliminary objection resulted in the following orders being made:

> *- Rents from the house no 39 Ursino North be deposited in court pending (sic) appointment of an Administrator of the estate of the deceased.*
>
> .....
>
> *- Since that the probate cause at the Primary cause was filed on 19/5/2005 publication was already effected, ie nine (sic) have expired, the primary court record is to be returned to as to be concluded. Anyone who is aggrieved with such decision shall have room to file appeal to the District Court. It is so ordered*
>
> *PRM*
>
> *11/10.*2005

Being dissatisfied with the decision of the District Court, the appellant filed an application for revision in the High Court under section 79 of the Civil Procedure Code. The grounds upon which the application for revision was made were:

a) *That there is no right of appeal from the preliminary decision or orders given by the District Court against the applicant.*
b) *That the District Court erred at law and in fact in failing to exercise jurisdiction vested in it by law in the matter.*
c) *That the district Court also acted with material irregularity, by its failure to adjudge that the matter was brought under wrong provisions of the law and was not properly before the Court.*

*d) That the District Court further erred at law and in fact in ordering return of the record to the Primary Court in utter disregard of an application to transfer the matter to the District Court and the fact that the primary Court had no jurisdiction to determine the probate cause.*

The application for revision was argued by way of written submissions. The respondent's counsel argued that revision in the matter was barred by virtue of Act No 25 of 2002, as the decision of the District Magistrate did not finally and conclusively determine the probate cause, which was being contested by the applicant. The learned judge who heard the revision found this argument to be sound and on that account he dismissed the application.

The appellant was not ready to surrender. She has come to this Court in search of her rights. Her memorandum of appeal contains two grounds of appeal, namely:

i) *That the Honourable Judge of the High Court erred at law and fact, for dismissing the Application for revision on the ground that the same contravened the provision of Act no 25 of 2005 while it was put to his attention that Primary Courts lack jurisdiction in determining matters concerning land registered under the Land Registration Act and;*

*ii) That the learned Honorable judge erred in law and in fact for not being reasonable, when he held that the appellant had to*

*wait till the matter is finally determined in the Primary Court without considering the fact that, any exercise after that decision would amount to academic exercise as the Respondent was about to dispose off, all properties of the estate of the deceased while the same were jointly acquired by the Appellant, who is a widow and her late husband.*

Mr. A. D. Bahede, learned advocate, prosecuted the appellant's appeal before us. The learned counsel argued that the High Court should have revised the proceedings in the District Court because there were apparent errors on the face of the record of the District Court, which included:

a) Granting prayers in an application without a hearing,

b) Ordering the return of the primary court record to that court for continuation of hearing while advocates are not allowed to appear there.

Mr. Mkoba, learned counsel for the respondent readily conceded to the appeal. He was of the opinion that it would be in the interests of justice if all proceedings in the lower courts were quashed and parties be advised to file their probate matter in the High Court. The learned counsel is appreciated for his wisdom in not contesting the matter because as we will endeavour to show shortly, there is no way the proceedings in both the High Court and the District Court can be allowed to stand.

In dismissing the application for revision, the High Court said that the decision being impugned was an interlocutory one from which no revision lay in terms of Act No. 25 of 2002. The CPC was amended by the said Act in section 79 by adding immediately after sub-section (1) sub section (2), which states:

> **"(2) Notwithstanding the provisions of sub-section (1), no application for revision shall lie or be made in respect of any preliminary or interlocutory decision or order of the court unless such decision or order has the effect of finally determining the suit."**

The question that immediately comes to mind is whether the matter before the District Court was an interlocutory one. As already indicated, the application in the District Court was filed under Order XXXVII rule (1) and (2), section 68 and 95 of the CPC. For an application to be maintainable under either sub-rule 1 or sub-rule 2 of Order XXX VII there is a condition precedent, which is that there must be a suit upon which the application is based. The provision states:

> **1. Where in <u>any suit</u>** (underlining provided) **it is proved by affidavit or otherwise–**
>
> **(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to**

**the suit of or suffering loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree; or**

**(b) that the defendant threatens, or intends to remove or dispose of his property with a view to defraud his creditors,**

**the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders:**

There is no ambiguity in the above provision. It begins by saying, **"where in any suit**..." This obviously presupposes that there must be a suit pending in court for an application under the rule to be maintainable. There have been a number of decisions on what amounts to interlocutory or preliminary proceedings. These decisions show that of necessity preliminary or interlocutory proceedings must be in relation to a pending matter in court. In **Israel Solomon Kivuyo v. Wayani Langoyi and Naishooki Wayani (1989) TLR. 140** this Court quoting from JOWITT'S DICTIONARY OF ENGLISH LAW, 2nd Edition at page 999 stated:

> *"An interlocutory proceeding is incidental to the principal object of the action, namely, the judgment. Thus interlocutory*

*applications in an action include all steps taken for the purpose of assisting either party in the prosecution of their cases, whether before or after judgment; or of protecting or otherwise dealing with the subject matter of the action before the rights of the parties are finally determined; or of executing the judgment when obtained. Such are applications for time to take a step, e.g. to deliver a pleading, for discovery, for an interim injunction, for appointment of a receiver, for a garnishee order, etc."*

It goes without saying therefore, that an application for a temporary injunction as was the case in the District Court could only be maintainable if it related to a legal action or step pending in court.

The next question is whether there was a pending suit in the District Court that would have warranted the High Court on revision to rule that in terms of section 79 (2) of the CPC revision could not be entertained. We need not engage ourselves much on this matter. There was no suit pending in the District Court. What was before the District Court was the probate matter from the Primary Court that had been called to the District Court so that the appellant could be legally represented. It cannot, in the circumstances be said as the High Court judge thought, that the decision of the District Court fell under the ambit of section 79 (2) of the CPC as amended by Act No. 25 of 2002. In any case, even if, for the sake of academic argument, it were assumed that the pending suit was the probate matter from

the Primary Court, then section 79 of the CPC would not have applied because the CPC does not apply in matters arising from Primary Courts.

The proceedings in the District Court were not only irregular for want of a suit upon which the application for temporary injunction was based. It was also highly irregular and a total confusion **firstly**, in the sense that the trial magistrate made a ruling on a matter in which parties had not yet been heard. As it was indicated earlier, the trial magistrate, in the course of determining a preliminary point of objection gave orders upon which she had conducted no hearing. In other words, she condemned the applicant unheard in so far as the order for depositing of the rents pertaining to House No 39 Ursino North was concerned. **Secondly**, it was highly irregular for her to order a return of the probate matter to the Primary Court for it to proceed with the appointment of an administrator while knowing that the applicant had engaged the services of an advocate who was barred from appearing in the Primary Court. In effect she denied the appellant her right to legal representation.

All in all, the proceedings in the District Court were highly irregular and a total confusion. An intervention by the High Court was therefore necessary in order to maintain propriety and order in court proceedings.

In the circumstances we allow the appeal. All proceedings and orders of the High Court as well as the District Court are quashed and set aside. Whoever wishes to pursue the matter is at liberty to file the same in an appropriate court.

Since the appeal was uncontested we make no order as to costs.

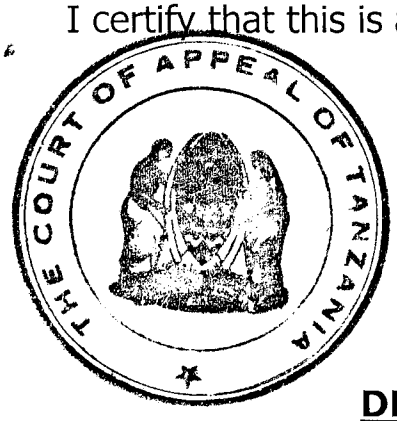
DATED at DAR ES SAALAAM this 4th day of February, 2009.

H. R. NSEKELA
**JUSTICE OF APPEAL**

E. A. KILEO
**JUSTICE OF APPEAL**

DR. S. J. BWANA
**JUSTICE OF APPEAL**

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




(P. A. LYIMO)
**DEPUTY REGISTRAR**