**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: KAIJAGE, J.A., MMILLA, J.A., And MZIRAY, J.A.)**

**CIVIL APPEAL NO. 118 OF 2015**

**HASSAN SALUM AHMED ..... APPELLANT**

**VERSUS**

**ALLY SALUM AHMED ..... RESPONDENT**

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

**(Aboud. J.)**

**dated 13th day of April, 2012**

**in**

**Probate and Administration Cause No. 63 of 2008.**

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## JUDGMENT THE COURT

3rd & 20th June, 2016

## MMILLA, J.A.:

This is an appeal by Hassan Salum Ahmed against the judgment and decree of the High Court of Tanzania at Dar es Salaam in Probate and Administration Cause No. 63 of 2008. He is asking the Court to quash the decision of the High Court and annul the appointment of the respondent, Ally Salum Ahmed whom he regards as having been wrongly appointed as an administrator of the estate of the late Salum Ahmed Awadh Basebe **(the deceased)** who died intestate on 5.8.1984.

The brief facts leading to this matter were that on 28.7.2008, the respondent petitioned for letters of administration in respect of the estate of "his father," the late Salum Ahmed Awadh Basebe who as aforesaid died intestate on 5.8.1984. On 11.12.2008, the usual citation was published in the Uhuru newspaper after the court had ordered the usual citation to be issued. Consequently, the grant was issued to the respondent on 24.3.2009. However, immediately after that grant the appellant and one Fatma Salum Basebe filed an application for its annulment on the ground of deceit allegedly because the respondent was not a son to their late father as he purported. After hearing that application, the High Court dismissed it on account that it was satisfied that the respondent was deceased's son, and blessed the appointment of the respondent as a legal administrator of the deceased's estate. Dissatisfied, the appellant instituted the present appeal. He raised four grounds which may conveniently be bridged into three of them as follows:-

1. That the learned judge erred and misdirected herself on both points of law and facts when she maintained that the respondent is a son to the deceased.

2. That the trial judge erred in appointing the respondent as an administrator of the deceased's estate without the express consent of the deceased's family members.
3. That the trial judge erred in analyzing the evidence on record hence arriving at wrong decision.

Submitting in respect of the first ground, Mr. Jethro Tulyamwesiga, learned advocate who represented the appellant said that the respondent was not one of the deceased's children and he was therefore, not a beneficiary to his estate. He contended that since the respondent was not a deceased's child, he was wrongly appointed by the court as an administrator of the deceased's estate. He made reference to section 33 (1) of the Probate and Administration of Estate Act Cap 352 of the Revised Edition, 2002, under which he said, the respondent ought to have disclosed the interest in the deceased's estate, including a general proof that he was part of the deceased's family.

Apart from that, Mr. Tulyamwesiga submitted that the respondent's identity is questionable as he used different names. He specifically referred to the administrator's oath where the respondent's name was indicated as Ally Salum Ahmed while at the end of the same document he affirmed as

Ally Salum Ahmed Basebe. He pressed further that the respondent's information that the deceased was a Tanzanian was wrong because at page 10 of the record the death certificate shows that he was a citizen of Yemen. He therefore submitted that the respondent was not telling the truth. He stress that according to Rule 64 of the Probate Rules, the respondent ought to have known the actual citizenship of the deceased. He therefore submitted that administrator's oath and the certificate of domicile were fatally defective hence that the petition for letters of administration was improperly before the court.

As regards to the second ground, Mr. Tulyamwesiga submitted that Rule 39 of the Probate Rules lays down the requirements, among others, for filing of the consent of the heirs. He contended that the respondent in the present matter did not comply with that Rule because he did not seek for consent of the deceased's family members.

Initially, Mr. Bernard Shirima, learned advocate who represented the respondent made submissions in opposition to what was advanced by his learned brother Mr. Tulyamwesiga. However, when it came to the ground touching on the question of consent of the other members of the clan, he conceded that the respondent did not obtain the said consent from the

deceased's family members before he petitioned for the letters of administration as required Rule 39 of the Probate Rules.

On our part, we wish to begin the discussion with the second ground of appeal which is conceded to by Mr. Shirima on failure to obtain the consent from other members of the clan which we think, for reasons which will unfold in the cause, be sufficient to dispose of the appeal.

We scanned the court record in an endeavour to satisfy ourselves on the strength or otherwise of that complaint. It is beyond dispute that the respondent neither obtained the consent of the other members of the clan nor filed any affidavit to show why he failed to do so as dictated by Rules 39 and 72 of the Probate Rules respectively. Rule 39 of the Probate Rules provides that:-

> *"A petition for letters of administration shall be in the form prescribed in Forms 26 or 27 set out in the First Schedule, whichever is appropriate, and shall be accompanied by the following documents–*
>
> *(a) subject to the provisions of rule 63 a certificate of death of the deceased signed by a competent authority;*
>
> *(b) an affidavit as to the deceased's domicile;*

*(c) an administrator's oath;*

*(d) subject to the provisions of rule 66, an administration bond;*

*(e) a certificate as to the financial position of the sureties;*

***(f) subject to the provisions of rules 71 and 72, consent of the heirs; and***

***(g) in the case of an application for a grant to a sole administrator, an affidavit as required by rule 32."*** [Emphasis added].

As will be noted, paragraphs (f) and (g) requires a consent of the heirs and an affidavit thereof. There is nothing in the record to show that these aspects were complied with. This is notwithstanding the fact that we have considered the provisions of Rules 71 (1) and 72 of these Rules. These rules provides as follows:-

"71(1) Where an application for the grant of letters of administration is made on an intestacy the petition shall, except where the court otherwise orders, be supported by written consent of all those persons who, according to the rules for the distribution of the estate

of an intestate applicable in the case of the deceased, would be entitled to the whole or part of his estate."

On the other hand, Rule 72 (1), (2) and (3) of the Rules provided that:-

*"72. (1) Where a person whose consent is required under these Rules refuses to give such consent, or if such consent cannot be obtained without undue delay or expense, the petitioner shall, together with his petition for grant, file an affidavit giving the full name and address of the person whose consent is not available (where such name and address are known) and giving the reasons why such consent has not been produced.*

*(2) Where an affidavit under paragraph (1) is filed, the court may make an order either dispensing with such consent or requiring a citation in the form prescribed in Form 57 set out in the First Schedule to be served upon the person whose consent is not available.*

*(3) Where the court makes an order under paragraph (2) of this rule requiring service of a citation the Registrar shall call upon the*

*petitioner to pay the prescribed fees for such citation and service and upon receipt of such fees shall cause the citation to be served."*

The certificates contemplated in these Rules were not filed. ***Ipso jure***, this is evidence that the requirement to furnish the consent of the family members under rule 39 was fragrantly violated. In our view therefore, the second ground of appeal has merit and we allow it. In consequence, we quash the order granting the letters of administration and also annul the letters of administration thereof.

Order accordingly.

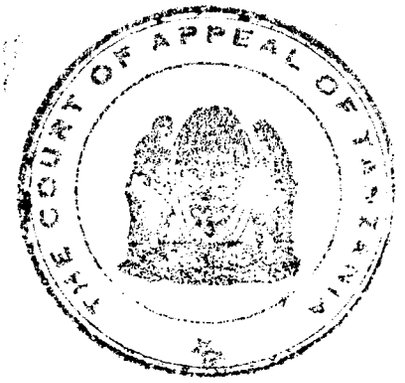
DATED at DAR ES SALAAM this 14th day of June, 2016.

S.S. KAIJAGE
**JUSTICE OF APPEAL**

B. M. MMILLA
**JUSTICE OF APPEAL**

R.E.S. MZIRAY
**JUSTICE OF APPEAL**

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




E.F. FUSSI
**DEPUTY REGISTRAR**
**COURT OF APPEAL**