IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And SEHEL, J.A.)

CIVIL APPLICATION NO. 199/01 OF 2019

MONICA NYAMAKARE JIGAMBA .....APPLICANT

VERSUS

1. **MUGETA BWIRE BHAKOME as administrator of the Estate of MUSIBA RENI JIGABHA ..... 1ST RESPONDENT**
2. **HAWA SALUM MENGELE..... 2NDRESPONDENT**

(An application for Revision of the Proceedings, Ruling and Order of the High Court of Tanzania, Dar es Salaam District Registry at Dar es Salaam)

(Arufani, J.)

Dated 13th June, 2018

in

Misc. Civil Application No. 46 of 2018

RULING OF THE COURT

25th August, & 16th October, 2020

SEHEL, J.A

The facts of the present application for revision can be traced back from the Probate and Administration Cause No. 41 of 2016. The late Musiba Reni Jigabha (the deceased) died intestate on 23rd August, 2015. He is survived with a son, Nguruti Jigabha from his previous

marriage with the 2nd respondent and a daughter, Nyambuli Melissa Jigabha with the applicant. He had left behind one house located at Plot No 462 B, Mikocheni B, Bima Road within Kinondoni Municipality in Dar es Salaam Region in which the applicant is residing with her children; money in bank account number 22310008673 with NMB bank; and shares in M/S MK Consult. After his death, a family meeting was convened and in that meeting it was resolved that the 1st respondent and one Mr. Israel Kamuzora to petition for letters of administration. It was only the 1st respondent who petitioned for letters of administration of the estate of the deceased.

The usual citation was issued and the same was published in the widely circulating newspapers. However, on the date fixed for hearing, nobody filed a caveat to object the 1st respondent from being appointed administrator of the deceased estate.

According to the affidavit of the applicant, during the probate proceedings the 2nd respondent was present and had no objection for the 1st respondent to be administrator. However, she made an oral application to the High court to be included in the list of the beneficiaries. Since the High Court was dealing with the appointment

of administrator it did not consider her prayer. It proceeded to grant the letters of administration to the 1st respondent.

That, sometime in 2018 after the appointment of the administrator, the 2nd respondent filed an application to the same court that is Miscellaneous Civil Application No. 46 of 2018 for two directions to be made to the administrator of the deceased's estate. **One**, to direct the administrator to include her in the list of beneficiaries of the estate of the late deceased as she claimed to be the legal wife of the deceased from way back in 1980 and had not divorced, and so has interest in the house situated at Plot No. 462 Mikocheni B, House number 22 at Bima Road. **Two**, to direct the administrator to restore her interest in the house. That application was made under section 65 of the Probate and Administration Act, Cap. 352 R.E 2002 (the Probate and Administration Act) and Rule 105 of the Rules. The 1st respondent being the administrator of the estate of the deceased was the only respondent in the application. When it was called for hearing, the 1st respondent intimated to the High Court that he had no objection to the prayers made in the chamber summons. Consequently, the High Court granted the prayers as sought by the 2nd respondent.

Following the grant of the application, the 1st respondent proceeded with the distribution of the estate of the deceased by granting a sole house left by the deceased to the 2nd respondent and her son; while the applicant and her daughter were jointly awarded the household furniture and deceased personal effects. The respondents have decided to evict the applicant in the said house left by the deceased. This precipitated the applicant to file the present revision application after having obtained an extension of time to file the same.

The application is made by Notice of Motion predicated under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E 2002 and Rule 65 (1), (2), and (3) of the Tanzania Court of Appeal Rules and it is seeking an order of the Court to revise the proceedings, ruling and order of the High Court dated 13th June, 2018 in Miscellaneous Civil Application No. 46 of 2018 on the grounds that:-

1. *The order sought to be revised was delivered in absence of the applicant;*
2. *The said proceedings and Ruling were tainted with illegality and irregularity for the court assumed the function of administrator by directing as to who should inherit from the estate;*

3. *The said proceedings and Ruling were tainted with illegality and irregularity for originating from an application made by a person who had no locus standi within the terms of Rule 105 of the Probate Rules, G.N. 369 of 1963 (the Rules); and*

4. *The said proceedings and Ruling were tainted with illegality and irregularities as the Court did not require the added beneficiary to prove her interest in the deceased estate.*

Both respondents were served with the application and they each filed their respective affidavits in reply to oppose the application.

At the hearing of the application, Mr. Othman Katuli, learned advocate appeared for the applicant whereas the 1st and 2nd respondents appeared in person. They did not have the services of a legal counsel.

The learned counsel for the applicant had earlier on 29/7/2019 filed written submission in support of the application in compliance with Rule 106 (1) and (2) of the Tanzania Court of Appeal Rules which during the hearing Mr. Katuli adopted it and made a brief elaboration on key issues.

For the first ground it was elaborated that the applicant was not a party in the proceeding at the High Court thus she has a right to bring

the present revisional proceedings as it was held in the case of **Grand Regency Hotel v. Pazi Ally & Others**, Civil Application No. 588/1 of 2017 (unreported).

On the 2nd ground of appeal, the applicant's counsel argued that by allowing the 2nd respondent to be included in the list of beneficiaries, the High Court irregularly directed who should inherit without there being any proof and that it wrongfully assumed the function of the administrator, of distributing the estate of the deceased. To augment his submission that it is the function of the administrator of the deceased to distribute the estate of the deceased, the learned counsel referred us to the High Court decision of **Ibrahim Kusaga v. Emmanuel Mweta** [1986] TLR 26.

As to the 3rd ground of appeal, it was the submission by the learned counsel that it is the executor or administrator who can apply for directions of the court under section 65 of the Probate and Administration Act and rule 105 of the Rules when he faced difficulty in the process of administration. According to him, the 2nd respondent had no locus to move the court for direction in regard to the estate or administration of estate which she is not administering.

On the 4th ground of appeal, it was briefly submitted that the two prayers made by the 2nd respondent are not within the ambit of section 65 of the Probate and Administration Act and rule 105 of the Rules.

Regarding the last complaint that the High Court erred in granting the prayers without there being proof, it was submitted that the 2nd respondent ought to have proved her interests in the deceased's estate, her contribution and entitlement and whether she was still married to the deceased.

With the above submission, the counsel for the applicant urged us to allow the application with costs.

Before we allowed the respondents to make their reply, we asked the counsel for the applicant as to whether the wording of the provisions of section 65 of the Probate and Administration Act and rule 105 of the Rules is restrictive. He conceded that it is silent as to who should invoke it and reiterated that practice had been that it is only the executor or administrator who invokes it. He also changed his position by arguing that if at all the 2nd respondent had any interest she ought to have filed a caveat to object the grant or else she should

have approached the appointed administrator to assert her interests. He added, if the administrator of the estate would not have heeded to her request then she had a chance to institute a suit against the administrator to establish her interests whereby all other beneficiaries and heirs would have had a chance to be heard.

When the 1st respondent took the floor to respond, he began his submission by asserting that he is a layperson. Hence, he is not very much conversant with the provisions of the law cited by the learned counsel. Nonetheless, he believed that the High Court could not have erred in applying the law. According to him, he did not see any illegality committed by the High Court by entertaining the 2nd respondent's application.

The 2nd respondent, on her part, agreed that she moved the High Court by invoking the provisions of section 65 of the Probate and Administration Act and rule 105 of the Rules in her application and she felt that the High Court correctly entertained and granted the prayers she sought.

It was rejoined by Mr. Katuli that the proper procedure according to the circumstances of the case was for the 2nd respondent to file the suit where all interested and necessary parties could have been heard.

Having heard the oral submission of the parties and after considering the notice of motion with its supportive affidavit, the two affidavits in reply, and the written submission filed by the applicant we think, the issue before us is whether there is any irregularity or illegality in the proceedings, ruling and order of the High Court that allowed the 2nd respondent's application for direction to be issued to the administrator of the estate of the deceased which application was predicated under section 65 of the Probate and Administration Act and rule 105 of the Rules.

But before we dwell on that issue, we wish to start with the undisputed and an obvious fact that the counsel for the applicant conceded that the provision of section 65 of the Probate and Administration Act is silent as to who should invoke it. He, therefore, abandoned that line of argument and on our part we shall not dwell in discussing it.

We gathered from the oral submission of the parties that they are in agreement with the fact that the applicant was not a party in Miscellaneous Civil Application No. 46 of 2018. Since she was not a party she could not have appealed. The only available remedy opened to her in this Court was to challenge that decision by way of revision. This is the position we took in the case of **Ahmed Ally Salum v. Ritha Basmali and Another**, Civil Application No. 21 of 1999 where the applicant bought an auctioned house and paid 25% of the purchase price on that day and eleven days later he paid the balance to the auctioneer who paid it into the court on the same day. He then applied by way of a letter to the court for vacant possession of the house of which he was granted. The 1st respondent complained to the Principal Judge and an ex parte administrative order staying the occupation of the house was issued. The applicant was aggrieved and he filed an application for revision where we observed and said:

> *"...as the applicant was not a party to the court proceedings, he could not have appealed and that revision was his only remedy."*

In that regard, the applicant took the right course of filing the present application for revision because she has no right to appeal against the order in Miscellaneous Application No. 46 of 2018.

We now turn to consider the merit of the application. We have alluded herein that during the hearing of the petition for letters of administration lodged by the 1st respondent, the applicant and the 2nd respondent were present. Basically, they did not have any objection to the petition but they each raised a concern over the house left by the deceased. The High court having heard them made the following pertinent observation:

> *"The court has carefully considered what was said in this court by the petitioner (the 1st respondent herein) together with two ladies (that is the applicant and 2nd respondent herein) who identified themselves in this court and also by the petitioner as the wives of the deceased and find there is no any of them who is objecting the petitioner to be appointed and granted letters of administration of the estate of the deceased.*
>
> *What featured in the arguments of the said wives of the deceased is the issue of the house of the deceased which is said at Mikocheni B, Plot No.*

462, Bima Road which each of them said was acquired at the time when they were living with the deceased. ***After considering their contention the court has found it cannot state anything in relation to the said house at this juncture and in this matter because the duty of seeing how the said house should be distributed and who will be entitled to get what in the said house is the duty of the administrator of the estate*** *who will be appointed and granted letters of administration of the estate of the deceased by this court."* [Emphasis is added]

We fully subscribe to the observation made by the High Court. As there was no caveat filed to halt the proceedings of the petition the High Court having been satisfied with the compliance of the provisions rightly granted the letters of administration to the 1st respondent. If there had been a caveat entered, in terms of the provision of section 59 (1) of the Probate and Administration Act, the proceedings on a petition for letters of administration could not have proceeded. The caveat remains in force for a period of four months, unless sooner withdrawn, from the date when it was lodged (See section 58 (4) of the Probate and Administration Act).

Basically, a party who alleges to have an interest in the estate of the deceased and wishes to assert her interests has a right to enter a caveat against the grant of the probate or letters of administration (see Section 58 (1) of the Probate and Administration Act). After the caveat has been filed the procedures enumerated under rule 82 of the Rules has to be followed including the filing of an application for issuance of a citation to the caveator or calling upon him to state his stance as to whether he/she supports the grant of probate or letters of administration or not (See section 59(2) of the Probate and Administration Act). Failure to comply with the prescribed procedure of the issuance of the citation to the caveator renders the proceedings a nullity. (See the cases of **Professor (Mrs) Peter Mwaikambo v. Davis Mwaikambo and Others**, Civil Appeal No. 52 of 1997 and **Revenanth Eliawory Meena v. Albert Eliawory Meena and Another**, Civil Revision No. 1 of 2017 (both unreported)).

Where a caveator appears and opposes the petition for probate or letters of administration then sub-section 3 of section 59 of the Probate and Administration requires the court to proceed with the petition in accordance with paragraph (b) of section 52 of the Probate and Administration which provides:

"in any case in which there is contention, the proceedings shall take, as nearly as may be the form of a suit in which the petitioner for the grant shall be plaintiff and any person who appears to oppose the proceedings shall be defendant."

It follows then that where a petition has been opposed, the probate or administration proceedings change, as nearly as can be, into an ordinary civil suit, where the petitioner becomes the plaintiff and the caveator becomes the defendant and parties are required to file special pleadings. The main purpose of that procedure is to facilitate the investigation of a caveator's objection and its effect is to enable the entire proceedings, but not just a part of it, to be dealt with in totality as in a suit and to be concluded as one whole (See the case of **Nuru Hussein v. Abdul Ghani Ismail Hussein** [2000] TLR 217).

In the present application, the 2nd respondent had neither filed a caveat nor objected to the appointment of the 1st respondent. Therefore, the High Court properly proceeded to appoint and grant the letters of administration to the 1st respondent.

Since the 2nd respondent missed the first boat and there is already in place an administrator of the deceased assets, it was expected of

her to approach the appointed administrator, the 1st respondent, and raise her concern to him. This is the position we stated so in the case of **Mgeni Seifu v. Mohamed Yahaya Khalfani**, Civil Application No. 1 of 2009 (unreported) that:

> *"....where a person claiming any interest in the estate of the deceased must trace the root of title back to a letters of administration, where the deceased died intestate or probate, where the deceased passed away testate."*

In this particular matter it is crystal clear that the 2nd respondent did not approach the administrator. She, instead, filed an application, Miscellaneous Civil Application No. 46 of 2018 against the administrator, the 1st respondent who did not oppose to. As such, the High Court granted the two orders as prayed. To us, the orders issued by the High Court to the administrator are problematic in law for two obvious reasons.

One, the High Court grossly erred when it stepped into the shoes of the administrator. The probate or letters of administration court has no powers to determine the beneficiaries and heirs of the deceased. Similarly, it has no power to distribute the estate of the deceased. The law has vested that power to the grantee of probate or letters of

administration. This is clearly provided under section 108 of the Probate and Administration Act which reads:

> *"The executor or* ***administrator shall,*** *with reasonable diligence, collect the property of the deceased and the debts that were due to him, pay the debts of the deceased and the debts and costs of administration, and* ***distribute the estate to the persons or for the purposes entitled to the same or to trustees for such persons or for the purposes entitled to the same or to trustees for such persons or purposes or in accordance with the provisions of this Act, as the same may be.****"*
> [Emphasis is added].

It follows then that it is the duty of the administrator to collect the properties of the deceased and the debts, pay the debts, identify the rightful heirs of the deceased, to whom the amount of residue of the proceeds of the deceased's estate should be distributed and at what percentage each heir will be entitled to get depending on the law applicable in the administration of such estate. In the case of **Mariam Juma v. Tabea Robert Makange**, Civil Appeal No. 38 of 2009 (unreported) we held:

> *"The High Court Judge did not have any mandate to determine who should be a beneficiary from the deceased's estate. This role was to be played by the Administrator of the deceased's estate* ***appointed by the court."*** [We added the bolded part]

It is our considered view that the High Court went beyond its jurisdiction by directing the administrator of the deceased estate to join the 2nd respondent as beneficiary and by removing one of the deceased estate listed by the administrator that is the house and bestowed it to the 2nd respondent.

Two, the applicant who claimed to be one of the beneficiaries was not made a party in that application. Therefore, an adverse decision was made against her without being afforded a right to be heard as complained. More so, the High Court did not have a chance to hear evidence from both sides for it to adequately and conclusively determine the interests alleged by the 2nd respondent in the deceased's estate. Of course, there could not be a hearing of the evidence because of the approach taken by the 2nd respondent. In our respective opinion, both common sense and logic dictate that, the 2nd respondent ought to have traced the title from the administrator for a

gentleman's agreement with the administrator. In case, the administrator refused to recognize her then she ought to have filed a suit against him where the applicant could also have a chance to be impleaded as a party therein.

Here, we are compelled to restate the position held in the case of **Nuru Hussein v. Abdul Ghani Ismail Hussein** (supra) that:

> *"In probate as well as administration cases, more than one heirs and beneficiaries to the estate are frequently involved. Where such a situation obtains, it becomes imprudent, if not fraudulent, to exclude them in the proceedings, for that would make a conclusive decision almost impossible. In other forms of litigation the provisions of Order I, rule 9 of the Civil Procedure Code, 1966, would apply, i.e. a suit will not be defeated by reason of the misjoinder or non-joinder of the parties, and the court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. Similarly, in other forms of litigation the court can take shelter under Order 1, rule 13 which requires objections on the ground of non-joinder to be taken at the earliest possible opportunity or else such objection would be*

deemed to have been waived. This rule, however, cannot apply where a necessary party to the suit is not before the court for no effective decree can be made in the absence of such party: ***Mulla****, Volume II, (14th Ed.), page 880. In Probate and Administration proceedings, therefore, we think Order 1, rule 10 (2) becomes specially relevant. It provides:*

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

Although the provision is seemingly permissive, in practical reality it operates compulsively where non-joinder would render the proceedings a non-starter. ***In an administration suit the omission of a necessary party is not a technical defect but goes to the substance***

***of the action**: **Mulla**, op. cit., page 855."*
[Emphasis is added]

Thereafter, we cited the case decided by the Supreme Court of India in **Kanakarathanammal v. V. S. Loganatha Mudaliar and Another**, (1965) AIR 271; (1964) SCR (6) 1 where a plaintiff filed a suit to recover properties left by her mother claiming to be the sole exclusive heir and refused to join as parties her brothers who were also her co-heirs. It was held:

> *"Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother,* ***the present suit filed by the appellant partakes of the character of a suit for partition, and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court."*** [Emphasis is added]

We thus concluded as follows:

> *"It is therefore incumbent upon the court of its own motion to order the addition of the co-heir or co-heirs, else its decision would risk being set aside."*

Given the fact that the applicant was not given a chance to be heard, the decision of the High court cannot be left to stand. It ought to be, and we hereby do, set it aside.

At the end and for the above reasons, we allow the application for revision with costs. Consequently, we quash the proceedings and set aside the ruling and order of the High Court in Miscellaneous Civil Application No. 46 of 2018.

DATED at **DAR ES SALAAM** this 12th day of October, 2020.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Ruling delivered this 16th day of October, 2020 in the Presence of Mr. Hussein Kita Mlinga, counsel for the applicant and the respondents who are present in person, is hereby certified as a true copy of the original.

S. J. Kainda
DEPUTY REGISTRAR
COURT OF APPEAL