IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 456 OF 2020

(CORAM: KWARIKO, J.A., MAIGE, J.A. And MWAMPASHI, J.A.)

TABU RAMADHANI MATTAKA ..... APPELLANT
VERSUS
FAUZIA HARUNI SAIDI MGAYA ..... RESPONDENT
(Appeal from the whole decision of the High Court of Tanzania at Dar es Salaam)

(Masabo, J.)

dated the 30th day of March, 2020
in
Probate and Administration Cause No. 15 of 2017

JUDGMENT OF THE COURT

11th February, & 1st March, 2022

MWAMPASHI, J.A.:

The appellant Tabu Ramadhani Mattaka filed a petition in the High Court of Tanzania at Dar es salaam (Probate and Administration Cause No. 15 of 2017), for him to be appointed an administrator of the estate of his deceased wife Ajuza Shabani Mzee (the deceased) who died intestate on 13.11.2014. He claimed, among other things, that being the lawful husband of the deceased and one of the three beneficiaries to the estate in question, suitable to be appointed the administrator of the estate of the deceased.

The respondent, Fauziya Haruni Said Mgaya, one of the three beneficiaries to the estate and the daughter of the deceased, registered

her objection to the petition by filing a caveat on two grounds; **One**, that the appellant's trustworthiness and faithfulness were questionable; and **two,** that she was not invited and involved in a family meeting in which the appellant was allegedly nominated to apply for letters of administration in question.

In its judgment, the High Court found it not proved by the respondent that the appellant was unfaithful or not trustworthy. As on the second ground of objection in regard to the respondent not being involved in the family meeting, the High Court found it established that although it was doubtful that such a meeting was really convened, the evidence showed that the respondent did not attend the meeting. Nevertheless, it was held by the High Court that non-attendance of the respondent to such a meeting was immaterial to the matter at hand because such a family meeting is not a prerequisite for grant of letters of administration.

Having found and held as above explained, the High Court did not grant letters of administration in question to the appellant/petitioner on the ground that the petition was incompetent for not being supported by written consents from all persons entitled to the deceased estate, particularly that of the respondent, as required by Rule 39(f) of the Probate and Administration of Estate Rules, G.N. No. 369/1963 (the

Probate Rules). It was further found by the High Court that the petition lacked an affidavit giving a full name and address of the person whose consent was missing as well as reasons why the consent could not be procured. The affidavit in lieu of consent filed by the petitioner/appellant was found by the High Court to be not in compliance with Rule 72 (1) of the Probate Rules as it did not indicate the name of the person in whose respect it was made and it did not give reasons why the consent could not be procured.

The High Court concluded that the petition lacked support of the consent of one of the beneficiaries, contrary to mandatory requirements of Rules 39 (f), 71 (1) and 72 (1) of the Probate Rules. For those reasons the High Court proceeded to dismiss the petition for being incompetent and the parties were instructed to reconcile and find an administrator with whom they all have confidence.

It is from the above background of the matter, the findings, holdings and decision of the High Court that the appellant has preferred this appeal on the following seven (7) grounds;

1. That, the learned trial judge having observed that the parties and relatives of the late AJUZA SHABANI MZEE had failed to agree on who is to administer the estate of the late JUZA SHABANI MZEE,

grossly misdirected herself in instructing the Appellant and the Respondent to sort out their differences and find a neutral Administrator.

2. That, the learned trial judge grossly misdirected herself in fact and in law for issuing a judgment and decree which is incapable of being executed by either party as it depends on the will and wishes of the Parties.

3. That, the learned trial judge having accepted and recorded that the credibility of the Appellant to Administer the estate of the late AJUZA SHABANI MZEE was not shaken by the Respondent, grossly misdirected herself in failing to appoint the Appellant an administrator of the estate of the late AJUZA SHABANI MZEE.

4. That, the learned trial judge having formed opinion that the petition before her was incompetent grossly misdirected herself in fact and in law for proceeding to determine the incompetent Petition on merits and dismissing the incompetent petition.

5. That, the Respondent having appeared in court and after having filed her defence and after having accorded her a right to be heard, learned trial Judge grossly misdirected herself in fact and in law for dismissing the petition for lack of consent of the Respondent.

6. That, the learned trial Judge grossly misdirected herself in fact and in law for not observing that the affidavit in lieu of consent formed part of the petition and that the lack of address of service of the

Respondent was not a requirement after the Respondent had showed up in court.

7. That, having regard to the circumstances of the case evidence on record and the conduct of the Respondent, the learned trial Judge grossly misdirected herself in fact and in law for closing doors to administration of the estate of the late AJUZA SHABANI MZEE and making it un administrable.

At the hearing of appeal the appellant was represented by Mr. Nickson Ludovick, learned advocate, whilst Mr. Jamhuri Johnson, also learned advocate, represented the respondent. In their respective submissions for and against the appeal, both learned advocates adopted written submissions they had earlier filed in Court.

For reasons that will become apparent in the course of this judgment, we do not intend to dwell on all the grounds of appeal raised but on the fourth ground only. We are of a settled mind that under the circumstances of this appeal, the fourth ground will dispose of the appeal sufficiently.

Submitting on the fourth ground of appeal, Mr. Ludovick argued that as it can be observed from page 138 to 141 of the record of appeal, the trial Judge, having formed an opinion that the petition was incompetent, continued to determine the said incompetent petition on merits and dismissed it. This, to Mr. Ludovick, was wrong. He contended that since

an incompetent petition is as good as nothing then the petition ought to have been struck out and not dismissed. He insisted that striking out the petition would have afforded the appellant an opportunity to correct the defects and re-file the petition but subject to laws of limitation.

Mr. Ludovick did also complain that the parties were not afforded an opportunity of being heard on the issue of the competence of the petition which was raised *suo motu* by the High Court in the course of its judgment. He contended that this was a fatal violation of principles of natural justice. To buttress the point, he referred us to the case of **National Insurance Corporation (T) Ltd v. Shengena Limited,** Civil Application No. 230 of 2015 (unreported).

As on what should be the way forward, Mr. Ludovick urged the Court to allow the appeal, quash the High Court decision and direct the appellant to re-file the petition.

In response to Mr. Ludovick's arguments on the fourth ground of appeal, Mr. Johnson supported the High Court findings, holdings and decision. He argued that the High Court properly considered the requirement that the petition needed to be supported by written consents from all the beneficiaries to the estate in question. He submitted that the petition lacked the consent of one of the beneficiaries as required by Rules

39(f) and 71 (1) of the Probate Rules. It was explained by him that in the instant case the beneficiaries were three; the appellant, PW2 and DW1 (Respondent). However, the petition was only supported by the consent of PW2. He added that the High Court did also not err in finding that the affidavit filed in lieu of consent was invalid as it did not indicate the name of the person in whose respect it was made and also because it did not give reasons as to why the consent could not be obtained. Mr. Johnson insisted that the petition did not comply with the mandatory requirement of Rules 39 (f), 71 (1) and 72 (1) of the Probate Rules.

It was lastly submitted by Mr. Johnson that from the material facts on record the only available remedy was for the petition to be dismissed.

We have dispassionately considered the arguments made for and against the fourth ground of appeal. We find it apparent that the petition was decided and dismissed for being incompetent. It is also crystal clear that the issue of the competence of the petition was raised by the High Court *suo motu* in the course of composing the judgment. The parties were not accorded an opportunity to argue or address on the issue. This, as correctly argued by Mr. Ludovick, was a gross violation of the right to be heard which is one of the principles of natural justice.

The legal consequence on the aspect of the High Court failure to accord the parties the right to be heard on the issue of the competence of the petition is settled. In **National Insurance Corporation (T) Ltd** (supra) the Court reiterated what it had earlier held in **I.P.T.L v. Standard Chartered Bank**, Civil Revision No. 1 of 2009 (unreported) thus;

> *"No decision must be made by any court of justice/body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice".*

As to what is the effect of denying a party the right to be heard, the Court, in the case of **National Insurance Corporation (T) Ltd** (supra) held that;-

> *"It is trite law that a decision reached in breach or violation of this principle, unless expressly or impliedly authorized by law, render the proceedings and decisions and/or orders therein a nullity even if the same decision would have been reached had the party been heard".*

See also; **Abbas Sherally and Another v. Rabdul Sultan H. M. Fazalboy**, Civil Application No. 33 of 2002, **Margwe Erro and Others**

v. Moshi Bahalulu, Civil Appeal No. 111 of 2014 (both unreported) and, **I.P.T.L v. Standard Chartered Bank** (supra).

In the instant appeal, as we have alluded on above, the High Court did not accord the parties the right to be heard on the issue of the competence of the petition which ultimately turned out to be the basis of the dismissal of the petition. The decision was therefore reached in violation of the right to be heard rendering the decision a nullity.

Let us turn to another limb of the appellant's complaint that having held that the petition is incompetent the High Court erred in determining the merits of the petition. It is clear, as also rightly complained by Mr. Ludovick, that after finding the petition incompetent the High Court ought not to have proceeded determining the petition on merits. We agree with him that after finding the petition incompetent, the High Court ought to have outrightly struck out the petition. A competent petition is as good as no petition.

Lastly, we again agree with Mr. Ludovick, that after finding and holding that the petition is incompetent, the right course was for the petition to be struck out and not dismissed. As it has been amply demonstrated earlier although the petition was determined on merits, the decision was not based on the determination of the same on merits but

on the same being incompetent. That being the case, the petition ought to have been struck out rather than dismissed. It should be emphasised that orders of dismissal and striking out a matter have different legal consequences. The Court elaborated the distinction between the two orders in the case of **Ngoni Matengo Cooperative Marketing Union Ltd v. Alimahomed Osman** [1959] EA 577, thus;-

> *"... In the present case therefore ... when the appeal came before this court, it was incompetent for lack of the necessary decree... this Court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this Court ought to have done in each case was to "strike out" the appeal as being incompetent, rather than to have dismissed it; for the later phrase implies that a competent appeal has been disposed of while the former phrase implies that there was no proper appeal capable of being disposed of".*

For the above given reasons, we allow the appeal and invoking our powers under section 4 (3) of the Appellate Jurisdiction Act [Cap 141 R.E. 2002], we hereby quash the judgment of the High Court dated 30.03.2020 and set aside the order of the dismissal of the petition. The matter reverts to the position that obtained on 27.02.2020. We direct for the record to be remitted back to the High Court for the composition of the judgment

by another Judge. It is further directed that should the High Court consider it necessary to determine the issue of the competence of the petition on account of lack of consent of the respondent, the parties should be summoned and heard on the issue before composing the judgment. We make no order as to costs.

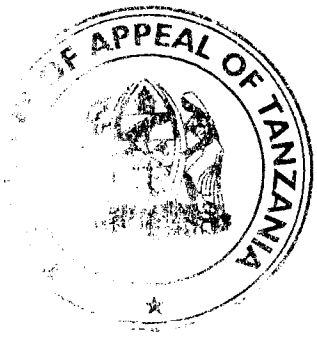
DATED at **DAR ES SALAAM** this 1st day of March, 2022.

M. A. KWARIKO
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

A. M. MWAMPASHI
JUSTICE OF APPEAL

The Judgment delivered this 1st day of March, 2022 in the presence of Mr. Jagad Robert holding brief for Mr. Nickson Ludovick, learned counsel for the Appellant and Mr. Ezekiel Joel Ngwatu holding brief for Mr. Jamhuri Johnson, learned counsel for the respondent is hereby certified as true copy of the original.



A. L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL