IN THE HIGH COURT OF TANZANIA

AT DARESALAAM

(PC) CIVIL APPEAL No. 2 OF 2011.

(Original from Probate Cause No. 517 of 2010, in the Primary Court of Temeke District, at Temeke and Civil Revision No. 31 of 2010, in the District Court of Temeke District, at Temeke).

MARIAM SALUM..... APPELLANT

VERSUS;

TATU MWISHEHE.....RESPONDENTS.

JUDGEMENT .

02/08/2012 & 19/10/2012.

Utamwa, J.

The appellant, **Mariam Salum** (Mariam) appeals before this court against the ruling of the district court of Temeke district, at Temeke in Civil Revision No. 31 of 2010, dated 25/11/2010 (the ruling). The appeal is filed against **Tatu Mwishehe**.

According to the record, the background of this matter goes thus; Mariam successfully filed a Probate Cause No. 517 of 2010 before the Primary Court of Temeke district, at Temeke (trial court) seeking to be appointed administratrix of the estate of her late husband, **Mwishehe Salehe**. Upon that appointment, the

district court in the absence of both parties, made the ruling which I quote for the sake of readymade reference;

"IN THE DISTRICT COURT OF TEMEKE
AT TEMEKE
CIVIL REVISION NO. 31 OF 2010
[Original from Temeke Primary Court, Mirathi No. 517 of 2010]
TATU MWISHEHE SALEHE.....APPLICANT
Versus;
MARIAM SALUM.....RESPONDENT.

RULING

Upon perusal of the Temeke Primary Court file I have come to discover the following anomalies:-

1. The clan/family meeting convened on 28/8/2010 was a one sided meeting that is why complaints are subsisting and would probably be infinitive if at all a joint family/clan meeting is not convened. The deceased has two wives and did have children with both wives. It is prudent and wise therefore that a joint clan/family meeting should take place under a neutral party appointed by the court and where need arises Administrators should be two people one from each part of the wives. If that cannot be arranged then a neutral person be chosen to be the Administrator of the deceased's estate, so that he may distribute properties among the heirs.
2. The deceased passed away 30 years ago, that is in 1970. It is only now on 31/8/2010 that one of his wives decides to open upon up this Probate and Administration Case. Reasons for such delay is (sic) not stated nor can this court in for any (sic). Because of this unsubstantiated delay, it is wise for the court to take all reasonable precaution (sic) and diligence when dealing with such a case in order to do away with unnecessary complaints.

I hereby order that the above, specifically on Para one (1) of my Ruling be complied with by the party seeking to re-institute the case.
It is so rodered.

Hon. K. S. Mkwawa,
RESIDENT MAGISTRATE
25/11/2010"

The totality of the appellant's complaints in the 7 grounds of appeal are to the effect that she was not availed with the right to be heard, the district court erred

to make the revision order while there was a right of appeal against the decision of the trial court and there were no good reasons for the revision by the district court.

The appellant made written submissions in support of her grounds of appeal, and I made an order to proceed with this judgment without waiting for the respondent's reply to the written submissions by the appellant. I reserved the reasons for that order and I am now set to disclose them in this judgement as I promised. The reasons for that course were that; upon her representative been rejected (on the grounds in the order dated 21/6/2012), the respondent neither appeared in court nor filed the reply to the written submissions in chief according to the scheduling order for filing the submissions. The law is to the effect that failure to file written submissions as per the court order is tantamount to failure to be prepared for hearing, and that omission justifies a court to proceed to the verdict, see a ruling in **Asulwike Kamwela v. Semu Mwazyunga, HC, (DC) Civil Appeal No; 13 of 1997, at Mbeya,** and an order in **Wendeline Mahundu v. Nicodemu Kasikana, (PC), HC. Civil Appeal No; 82 of 2005, at Dare Salaam.** The conduct of the respondent was thus of a party delaying the case unnecessarily, which is a conduct that courts of law cannot condone. For these reasons I believed, I was justified to proceed in writing this judgement. However, I do not think if the course I took will cause any injustice to the respondent because, I will consider the merits of the appeal according to the law. It is in fact, a duty of any court of law to preside over matters in accordance to law irrespective of the indifferent approach of the parties, see **John Magendo v. N.E.Govani (1973) LRT. 60**, and it is more so where laymen are involved into the proceedings, as it is the case in the matter at hand.

According to the circumstances of this matter, and following the fact that both parties before me ware laymen who could not offer any substantial legal

assistance to the court in deciding the appeal, I find it obligatory for me to first test the issue of whether or not there were sufficient reasons for the district court to make the ruling. This issue is derived from the totality of the grounds of appeal numbered 3 and 4 in the petition of appeal. According to the records, the ruling suggests that it was a revisional order made by the district court under S. 22 of the Magistrates Court Act 1984 (Cap. 11, R. E. 2002) though the district court did not expressly indicate so. This view is based on the grounds that in law a district court can interfere with a decision or proceedings of a primary court through two kinds of proceedings namely; appellate and revisional proceedings. In the matter at hand, no any petition of appeal was preferred to the district court against the decision of the trial court as per S. 20 of Cap. 11. Instead, a mere complaint letter by Tatu Mwishehe Salehe dated 24/09/2010 was lodged in the district court lamenting against the proceedings in the trial court. Apparently the letter moved the district court to call for and inspect the records of the trial court, hence the ruling which is titled "Civil Revision No. 31 of 2010." The appellant thus rightly believed that the ruling was a revisional order affecting her appointment made by the trial court, hence this appeal.

In my view, under the circumstances of this case and according to the law (see S. 21 (1) (a) and (b) read together with S. 22 (1) and (2) of Cap. 11) the district court had revisional jurisdiction to call and examine the records of the trial court for the purposes of satisfying itself as to the correctness, legality or propriety of its decision or order (for the appointment) and as to the regularity of any proceedings therein. Eventually, the district court could confirm, reverse, amend or vary in any manner the trial court's decision or order. The district court could also revise the proceedings of the trial court or make an order quashing them and order a rehearing, or it could direct the trial court to take additional evidence and certify

the same to it (the district court) or, for reasons to be recorded in writing, to hear additional evidence itself. It follows therefore that, a proper revisional order of a district court must in law point out the incorrectness, illegality or impropriety of the decision of the primary court and or the irregularity of its proceedings before it makes any order affecting such decision or proceedings. For this stance, revisional proceedings in law are preferred only where there are errors on the face of records, and they are aimed at correcting the errors, see also the decision of this court in **Winifrida Tofilo v. Mathias Makukuba, High Court of Tanzania (HC), Civil Appeal No 49 of 2003, at Mwanza** (unreported, by Masanche, J as he then was). It is also my settled view that the incorrectness, illegality or impropriety of the decision of the primary court and or the irregularity of its proceedings envisaged by the law cited above must relate to a serious violation of clear provisions or principles of law and not otherwise. Again, it is my construction of the law that, revisional proceedings before a district court must end with one or more of the orders mentioned above.

The ruling under discussion however, did not mention any provision or principle of law that was violated by the decision or proceedings of the trial court. Instead, the ruling is suggestive under its paragraph 1 that the clan meeting (apparently that had proposed Mariam as the administratrix to be appointed by the trial court) was against "prudence and wise" (as the district court put it) for been one sided. The district court termed this alleged omission as anomalies. The said "prudence and wise" according to the district court required a joint clan meeting for purposes of appointing a neutral administrator or two of them one from each side of the two wives of the late Mwishehe. The district court was optimistic in its ruling that the course it envisaged would eliminate complaints. Under paragraph 2 of the ruling, the district court suggested that the trial court was unwise in not

taking reasonable precautions and diligence in dealing with such a belated probate matter, which said precautions and diligence could avoid unnecessary complaints. In my view, the proceedings and decision of the trial court could not be tested against the prudence and wisdom of the presiding magistrate in the district court, which said prudence and wisdom were not backed by any provision or principle of law. Otherwise, this would be a very fragile gauge of justice, and it is more so considering the fact that matters for which the district court blamed the trial court are matters of evidence which was wanting before the district court. It is also surprising that, even the complaints in the letter by Tatu (which said letter apparently prompted the revisional proceedings before the district court) did not relate to matters indicated in paragraphs 1 and 2 of the ruling. Tatu's grievances were clearly that the probate matter in respect of the estate of the late Mwishehe had already been determined back in 1973 as probate No. 6 of 1973 in the same trial court, and one Juma Yaga had been appointed administrator. In my view, it was open for Tatu to object the allegedly subsequent probate proceedings (by Mariam) before the trial court, which said trial court could determine the objection according to law. It was not thus clear as to how the district court resorted to matters of prudence and wisdom as shown in paragraphs 1 and 2 of the ruling as the base of its ruling which amounted to a revisional order.

Moreover, even if the ruling had sufficient grounds for the revision, it could not stand in law because, it ended by ordering that its directives under paragraph 1 be complied with by any person seeking to re-instate the case. By reading paragraph 1 of the ruling, the district court might have meant that, whoever wanted to re-institute the probate matter, he had to convene a joint meeting for purposes of proposing a neutral administrator or two of them one from each side of the two wives. However, when the district court made that particular directive it had not

made any substantial order/decision on the fate of the proceedings and decision of the trial court appointing Mariam. In other words, the district court had not reversed or amended or varied in any manner the appointment before it made the directive in respect of compliance to paragraph 1 of the ruling. Moreover, it had not revised or nullified or quashed the proceedings of the trial court before it made the directive. How could the order to comply with paragraph 1 of the ruling be complied with by any party to the proceedings in the absence of a prior order making the proceedings and the decision of the trial court ineffective through any of the above mentioned legal mechanisms? That was obviously impossible.

For the above reasons, the ruling neither pointed out the errors on the face of the records of the trial court justifying the ruling nor rectified any error as the law cited herein above would require it to do. The ruling was thus a purposeless revisional order which is a creature not known to our law because, revisional orders are never made for cosmetic purposes. The district court, being a statutory creature with statutory revisional jurisdiction had no option other than to comply with the statutory provisions cited above in exercising its revisional jurisdiction, but it failed to do so. I thus determine the issue negatively to the effect that there was no any sufficient reason for the district court to make the ruling. For the reasons stated above, the proceedings before the district court and the resulting ruling cannot stand before the eyes of law for being a nullity. I am thus not bound to test the rest of the grounds of appeal because the above finding is capable of disposing of the entire appeal.

Having observed as above, I allow this appeal and I order that the proceedings before the district court are hereby quashed and the resulting ruling is hereby set aside. Each party shall bear her own costs because it was the district

court which unnecessarily opened the revisional proceedings and subsequently made the ruling which was uncalled for. It is so ordered.

JHK. UTAMWA
JUDGE.
19/10/2012.

Date; 19/10/2012.
CORAM; Hon. Utamwa, J.
For Appellant; present in person.
For Respondent; Absent.
BC; Mrs. Kaminda.

Court; judgement delivered in the presence of the appellant, Mariam Salum and in the absence of the respondent, Tatu Mwishehe in chambers this 19th day of October, 2012. The respondent be notified of this judgement if she makes a follow up and be informed of her right of appeal in case of any grievances.

JHK. UTAMWA
JUDGE.
19/10/2012.