IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

CIVIL APPEAL NO. 5 OF 2018

(C/f District Court of Arusha at Arusha in Civil Appeal No. 45 of 2017 originating from Arusha Urban Primary Court in Probate and administration case No. 156/2009)

RITA ALEX MARO ..... APPELLANT

Versus

EMMANUEL ALEX MARO ..... 1ST RESPONDENT
BRUCE ALEX MARO.....2ND RESPONDENT
EVA ALEX MARO ..... 3rd RESPONDENT

JUDGMENT

Date of last Order: 16/05/2018

Date of Judgment: 09/08/2018

BEFORE: S.C. MOSHI, J

The appellant has been aggrieved by the decision of Arusha District Court, Hon. Kisinda – RM in Civil Appeal No 45/2017. She has preferred this appeal with seven (7) grounds of appeal as follows:-

1. That both, the lower courts, the primary court and first appellate court erred in law and in facts in entertaining the proceedings which their hands are **functus officio.**
2. That, the lower courts, the primary court and first appellate court erred in law and in facts by failure to abide to the established law and principles hence it arrived at erroneous decision.

3. That, the primary court, in re opening the file which was closed without following due process of the law has occasioned miscarriage of justice and lead to illegal and irregular judgment.
4. That, the primary court erred in law and in fact by revoking the appointment of the appellant as an administrator while the appellant is no longer administrator.
5. That, the first appellate courts erred in law and in facts by blessing the legal error committed by the trial court by revoking the appointment of the appellant as an administrator, while the appellant is no longer administrator.
6. That, the first appellate court erred in law and in facts to upheld the decision of trial court which did not consider the evidence tendered by the appellant.
7. That, the first appellate court erred in law and fact to entertain the matter which is res Judicata.

Before this court the appellant was represented by Mr. Sambo learned advocate while the respondent was represented by Mr. Yoyo Learned advocate. The appeal was disposed of by way of written submission.

In his written submission the counsel for the appellant submitted and argued grounds number 1, 4, 5 and 7 all together; it was his submission that, both lower courts, the primary court and the first appellate court erred in law and in fact in entertaining the proceedings which their hands are functus officio, as the administration of probate in, probate cause No 156 of 2009 was closed on the 19/11/2015 by Honourable Sadoyeka, RM.

It was his humble submission that, after the closure of the probate the prayer which was not objected by all heirs, that marked the end of entire administration of the late Anastazia Alex Maro, if the respondents had any other claim the same were to be channeled to other legal remedy available to them and not re-opening the closed administration, because after closing the administration cause number 156 of 2009 on the 19/11/2015, the appellant here ceased to be administrator of the late Anastazia Alex Maro any longer. Therefore it was wrong and unknown procedure for the Arusha urban primary court to revoke the administration of someone who has closed the administration. In another word, the appellant herein was no longer administrator. There was nothing before the court to revoke. In simpler language, the primary court on the 19/09/2017 was purporting to revoke the appellant herein from being administrator who is no longer administrator. It was the learned counsel submission that, after the closure of administration, the law has set the remedy for any party who has dissatisfied with the administration of the whole process of division of assets and not to reopen the closed administration.

He submitted further that, in closing the administration the court itself mis-numbered the probate cause instead of writing probate cause No. 156/2009 it wrote Probate Cause No 156/2006, that was clerical/arithmetical error committed by the court which does not go to the root of the probate cause herein, because, **Firstly,** it is the name of the deceased which appear in the order of the court dated 15/11/2017 closing the administration is the same name as that which appears in probate cause No 156/2009. **Secondly,** the appellant herein who was the

administrator of the estate of Anastazia Alex Maro is the one who was praying to close the administration on the 15/11/2015. The prayer which was granted as it was not objected by all hears. **Thirdly,** the name of the beneficiaries and or hears appeared in the so mistakenly order of the court, which is mis-numbered as probate case No. 156/2006 is the same as who appeared in inventories and accounts filed in closing the administration cause number 156/2009. He said that, on this point they have taken enough time in perusing the file to satisfy themself to the filled form Number V and form Number VI. There is no doubt that the list of distribution on form Number VI filed in closing the probate cause number 156 of 2009 is the same as that which the court had mistakenly numbered as Probate Cause Number 156/2006 instead of probate case number 156 of 2006. **Fourthly,** is the properties so distributed in probate cause Number 156 of 2006 by the Primary court in its decision of 19/11/2015 is the same with the one listed in an accounts filed by the appellant entitling probate cause number 156 of 2009. **Fifthly**, the order dated 15/11/2015, is not the one which closed the administration, of which they did not know how it got its way to the file? With the same deceased, same administrator, same beneficiaries and the same properties.

He submitted that, from the above narration it is clear that, the order of the primary court dated 19/11/2015 closed the administration and the typing error committed by the court instead of writing Mirathi Namba 156/2009 it wrote Mirathi Namba 156/2006 cannot be vitiated to the parties (in this case the appellant) who properly filed the inventories and

accounts with correct number 156/2009 as required by 5th schedule to the Magistrates court act, cap 11 R.E 2002. It was his submission that, the Court of Appeal has several times encountered the same scenario of typing error in the case of ***GAPOIL (TANZANIA) LIMITED V. TANZANIA REVENUE AUTHORITY (CIVIL APPEAL NO. 9 OF 2002) [2002] TZCA 37 at pages 4 and 5 Para 6.*** The learned Justice of Appeal had the following to say as they did quote.

> ***"we are, in the light of the above, satisfied that the mis description of the parties in the ruiing and drawn order of the High court at pages 227 and 238 of the record of appeal was a typing error because the particular error are not reflected in the text of the ruling and drawn order. We are also satisfied that the said mis description of the parties is a minor and curable defect under the slip rule. Under the circumstances, we overrule the preliminary objection and grant the appellant leave to rectify the record of appeal..."***

He did cite the case of ***NDWATY PHILEMONI OE SAIBULL V. SOLOMONI OLE SAIBULL, [2000] 209. At page 2017, the Court of Appeal had this to say in scenario where the mistake is committed by the court***

> *"... for these reasons we uphold the first ground of the preliminary objection and say that since the decree which was annexed to the record of appeal is invalid, this appeal is incompetent and we order*

that it be struck out. ***For the same reason that this court gave in Civil Appeal Number 2 of 1990, we think that justice demands that the appellant be put in a position whereby he can easily re-institute his appeal in this court should he so which. With that in view, we hereby direct that the appellant be at liberty to apply to the High court within twenty one days of receiving this decision for a decree in appeal properly signed by the judge concerned or in case the judge concerned has vacated office for any reason,*** *then such decree shall be signed by his successor. We further direct that the appellant be at liberty to re-institute the appeal in this court within fourteen days from the date of obtaining the decree for the High Court without further payment of Court fees. As the appellant is not in any way to blame for this lapse, we make no order as to costs*

He submitted that, with the authority above, the mis-numbering of probate case, instead of Mirathi Namba 156/2009 appearing as Mirathi Namba 156/2006 is a minor and curable defect under slip rule. This court had power to order the primary court to correct the said mis description of probate number to put the records clear.

It was his further submission that, another position on effect of the error committed by the court was put on rest by the court of Appeal of Tanzania at Arusha, in the case of **Godbless Jonathan Lema Vs Mussa Hamisi Mkangu and 2 other**, at page 8, 9 and 10 the Court had this to;

"It is obvious that the decree which forms the subject matter of the appeal does not agree with the judgment. The judgment refers to section 114(1) – (7) of the Elections Act but the decree refers to section 113 (1) – (7). Obviously the decree and the judgment are in variance. The decree violates order XX Rule 6 and 7 of the Civil Procedure Code. The advocates for the appellant concede to the defect but they contend that the defect is no fatal. They associate it with either a slip of the pen or a typing mistake and such a mistake does not go to substance of the decree. They prayed that this ground of objection be dismissed. ***On our part, we agree with the learned advocate for the appellants on the first ground of objection that the error could be either one of the slip of the pen or typographical and not of substance. A slip of the pen for the one who prepared the decree for typing and typographical for the one who did the typing. The one who prepared the decree could have instead of writing section 114(1) – (7) write section 113(1) – (7). That error would also go to the typing. If the error was committed by the one who did the typing, then the mistake is one associated with a typing mistake. It is a keyboard mistake. The one who did the typing typed 113 instead of 114. For those acquainted with the keyboard, they will easily accept that such mistakes are committed each time***

and again. *Section113 of the National Elections Act has only subsections (1) and (2). Moreover, the section does not deal with the task of communicating the results of the elections to the Director of elections. The section dealing with communication of the results of the elections is section 114. It is the one which has subsection (1) to (7). Except for the error in the mix up of sections the decree as it appears above meets all other requirements as given in the provisions. It is dated and signed by the learned trial judge. Unlike the defect which were in the case of Philemon Mang'wehe t/a Bukane Traders (supra) and Uniafrico Limited and two others (Supra) where the date of the pronouncements of the judgment differed with that one on the decree, in this appeal the date of the judgment and the one on decree tallies. The judgment was pronounced on 5th April 2002. This is the date reflected on the decree. It is also signed by Rwakibarila, the learned judge who presided over the proceedings. This appeal can be distinguished from above cases. Under the circumstances we make a finding that the first ground of objection has merit only to the extent that there is an error in the decree in a mix up of sections.* ***However, the error is either one of a sllp of the pen or a typographical error. For thls reason, the decree can be amended under rule 111 of the Courts Rules"*** *[Emphasis is Supplied]*

He submitted that, with the authorities of the Court of Appeal and that of the High Court, the error on the order being typing and error committed by the court, then, this court has power to order the same to be corrected by the primary court as it was done in the cited case above, because is a tying error or commonly called slip of the pen committed by the court. It is well established principle that, the error which has been committed by the court itself, the litigants cannot be penalized for it.

On the second ground of Appeal that, the lower courts, the Primary Court and first appellate court erred in law and in facts by failure to abide to the established law and principles hence it arrived at erroneous decision. It was his submission that, the first appellate court and the primary court both erred in law, procedure and in principle as the Arusha Urban primary court reopened the administration of estate which was closed. And for the first appellate court's failure to see the illegality committed by the trial primary court to reopen the administration which was full closed, because the way the probate cause number 156 of 2009 was reopened and it did not at all comply with the law. From the perusal they made to both court files especially primary court, they came to realize that the court did not abide to the requirement of reopening the probate because the alleged minutes dated 31/01/2017 which are presumably, to have been used to reopen the Mirathi namba 156 of 2009, there is no explanation how that minutes was received in court, the said minutes has no court stamp to show that it has been received by the court. There is no endorsement at all by the court, neither by the Magistrate or by the clerk of the court to show

and evidence that it is has been admitted or received in court. The record does not show how the said minutes got its way to the corridor of justice.

On the 6th ground of Appeal, he said that, the first appellate court erred in law and in facts to uphold the decision of trial primary court which did not consider the evidence tendered by the appellant. It was their submission that, the trial primary court also erred in law and in fact in upholding the decision of the trial primary court which was based on the weakness of testimony by the respondent and did not consider the strong testimony tendered by the appellant in all of respondent testimony no one has produced any proof to the allegation leading to the revocation, all the testimonies has no backup at all, the proceedings reveals that it's from the ill motive of the SU1 that led to the revocation. The testimonies of the SU1 leaves no doubt that the probate cause number 156/2009 was closed and after closing the primary court had no jurisdiction to reopen it. If the respondent was not satisfied with the division they have other legal remedy to take and not to reopen the probate which was already closed.

He submitted further that, the trial magistrate in primary court also based her judgment on ill films of the respondents herein which was not backed by evidence. She mentioned that the appellant was intending to confiscate some properties without mentioning any of the alleged properties that the appellant was intending to confiscate it.

It was the learned counsel submission, that they have gone through the order of the court in which the trial magistrates claims that, he has not seen a hand written order for closure of the probate. With due respect to the trial magistrate, it seems she is not at per with the technology that now

some proceedings and judgments or order are being typed electronically and there can never be a hand written proceedings or order as she tried to suggest. The typed order dated in 15/11/2015 is valid on the eyes of the law because it has been signed and has a stamp of the court, and that it was wrong also for the first appellate court to base its judgment on the letter with reference No. JY/DM40/C.12/XIIV/80 dated 30/08/2017 which was issued by District Magistrate In-Charge without having a careful perusal of the lower court. Had she been careful with settled mind and perused the lower court's record, she could appreciate that the administration was closed as much as discharged in ground number one.

Before embarking into countering every single argument assailed by the learned counsel for the appellant, Mr. Yoyo gave a brief background underpinning the matter at hand, that the appellant was dully appointed by Arusha urban primary court vide SHAURI LA MIRATHI NO 156/2009 to be THE ADMINISTRATRIX of the estate of her late mother ANNASTAZIA ALLEX, who died interstate on 25/11/2008 and left behind five beneficiaries of her estate namely RITA ALEX MARO, EMMANUEL ALEX MARO ,BRUCE ALEX MARO, AND EVA ALEX MARO. The administratrix who is also a beneficiary, carried out her mandate with material irregularities; the irregularities that occasioned to devastating injustice to the rest of the beneficiaries. He said that among the atrocities perpetrated by the said administratrix was uttering of TWO DIFFERENT VERSION OF THE INVENTORY WITH DEFERENT PARTICULARS to the court an act that put her integrity and truthfulness into serious question as to whether she was mindful and fair about the right of her fellow heirs. As if that was not

enough, the said administratrix failed to close SHAURI LA MIRATHI NO 156/2009 as strictly required by the law, in that the beneficiaries of the estate of the late ANNASTAZIA ALLEX, were at no point in time summoned before the court to affirm whether they are contented with the distribution or not. To that end, the rest of the beneficiaries of the estate of the late ANNASTAZIA ALLEX, were left in suspense not knowing their fate an act that left them with no other option than to petition for revocation of the administratrix so that justice can be done to them. Upon lodging their formal complaint for mis-management of the estate, the said administratrix was dully summoned before the trial court to show cause and account for the complaint leveled against. She entered appearance and preempted the complaint leveled against her, on the score that she had already closed the case henceforth not responsible at law to be disqualified or questioned. Upon scrutiny of the respective court file, alongside with the oral presentation of the complainant before the court it turned out that the said matter was never closed and the court document adduced by the administratrix purporting to have closed the matter left much to be desired, for it did not tally with the court proceedings apparent in the original court file. It was against such backdrop, that the trial court magistrate opted to prefer the matter to the in charge ARUSHA URBAN PRIMARY COURT for scrutiny whereas the said in charge also opted to forward the same the DISTRICT COURT IN CHARGE, Honorable Msoffe for further scrutiny and Directives as to what should be done. Having scrupulously and meticulously gone through the court record THE DISTRICT COURT MAGISTRATE IN CHARGE, honorable MSOFE arrived to

a clear and uncontroverted conclusion, that the said SHAURI LA MIRATHI NO 156/2009 was at no point in time closed as purported by the administratrix henceforth directed the trial court to proceed with hearing the complaint against the administratrix and determine the same on merit. The respondents brought to court witnesses who adduced credible, reliable and plausible evidence; the evidence that proved beyond the peradventure that the administratrix did not manage the estate in the strict adherence to the law and in the best interest of other beneficiaries. It was on the strength of the evidence adduced before the trial court that the trial court was left with no other option than to revoke appointment of the administratrix and replace her with another beneficiary. Aggrieved by the ruling of the trial Court, the appellant preferred the matter to the District Court of Arusha and their complaint was that the trial court was not justified at law to revoke the appointment of the administratrix who according to her had already closed the probate cause No 156/2009. The first appellate court dismissed the appellant's appeal for lack of merit aggrieved the appellant has preferred the present appeal.

Responding to grounds ONE ,FOUR ,FIVE AND SEVEN as submitted by the appellant's counsel it was Mr. Yoyo's submission that, the appellant counsel, have left very crucial and nagging questions unfolded, the questions which they believe if properly considered, will lead to only one logical findings that the conclusion reached by trial court and 1st appellate court was valid , fair ,verifiable and in accordance to the law. He started submitting with the nagging questions that have been left un answered over the purported closure of **SHAURI LA MIRATHI NO**

156/2009, and the purported abuse of due process of law by the trial court and the 1st appellant court, it was his submission that the appellant's counsel has left serious questions which they believe if properly considered at this stage shall enable this honorable court to do substantive justice. The questions that are left unfolded among others are:

1. **"WHERE EXACTLY IS THE COURT PROCEEDING worth of establishing beyond scintilla of doubt that there was a business before Arusha urban primary court on 15th November 2015 in which the shauri la Mirathi No 156/2009 was closed?**

2. where exactly are the beneficiaries signatures in the hand written proceedings of the court worth of establishing beyond iota of doubt that on 15th November, 2015 the beneficiaries of the estate of the late ANNASTAZIA MARO did really enter appearance in Court and verify their contentment with the distribution before closure of file ?

3. Whether there is another better reference to be look at more than COURT PROCEEDING when the court is in suspense as to existence or propriety of the court order .

4. Which legal provision or judicial authority that can be relied upon to hold that omission of court proceedings or lack of it is a mere clerical error which the high have inherent power to order the inferior Court to insert even after conclusion of proceedings.

5. Where exactly is the legal justification for an administrator of estate to utter two different sets of inventories with different particulars?

6. what is the legal basis for condoning A FLAGRANT MISREPRESENTATION of the administratrix the misrepresentation that boil down to administratrix key mandate and beneficiaries welfare ?

7. Where is the legal justification for faulting the trial court who before exercising the jurisdiction vested to him opted to refer the matter to higher court for revision and eventually acted solely on directives of the higher court?

8. where is the legal justification for faulting the district court in charge who essentially invoked its revisionary powers conferred to her by statute to revise the matter , and gave realistic directive depending on the real circumstance of the case.

It was his submission that, The lengthy submission in chief is absolutely silent on answering the above pertinent questions. Starting with the legal basis upon which the revocation was made, it is settled law that the mis management of the deceased estate form the sufficient basis for revoking the administrator of the estate and that is what regulation Rule 9 sub rule 1 (e) of THE PRIMARY COURT ADMINISTRATION OF ESTATE RULE GN 49/1971 provides:

9. *REVOCATION OR ANNULMENT OF GRANT OF ADMINISTRATION*

(1) Any creditor of the deceased person's estate or any heir or beneficiary thereof, may apply to court which granted the administration to revoke or annul the grant on any of the following grounds–

(a) that the administration had been obtained fraudulently;

(b) that the grant had been made in ignorance of facts the existence of which rendered the grant invalid in law;

(c) that the proceedings to obtain the grant were defective in substance so as to have influenced the decision of the court;

(d) that the grant has become useless or inoperative;

(e) that the administrator has been acting in contravention of the terms of the grant or willfully or negligently against the interests of creditors, herein or beneficiaries of the estate. (underline supplies for emphasis)

It was his submission that, it is clearly manifested from the record that the administratrix in question did utter two different sets of inventories which in itself and even in the absence of other evidence demonstrate on her malice and in term of regulation 9(1) (e) supra constituted a sufficient ground for revocation. Embarking on specific question that the Court was invited to resolve, it is instructive to be noted that upon production of the Court order dated 15th Nov 2015 refuting the complaint of non-closure of probate cause No 156/2009 the real question and dispute that the trial court was invited to resolve was **not a mere numbering of the cases but the real existence of such order and its propriety,** Given the contradiction and the circumstance, the only viable reference for any fair minded adjudicator was the court proceedings from which such disputable

order was extracted and the lack of such order in the court proceeding spoke volume on its real existence and propriety.

He further submitted that, it is a settled practice and indeed cardinal principle of practice that whenever there is a dispute or impeachment of Court record it is the proceedings and in most cases hand written proceedings that must be resorted to ascertain the veracity of the Court document to meet the end of justice. In the matter at hand, it is the Court proceeding that was resorted by way of revision done by the district court, to wit it was conclusively established with all certainty, that there was never an order for closing the probate cause No 156/2009.

Embarking on the question whether the power exercised by trial court and District court in charge, were founded in law and whether they acted judiciously. He submitted that, it is a settled law that the district Court is seized with revisionary powers to call and to examine the record of any proceedings in the primary court for the purpose of satisfying itself on correctness and propriety of any decision or order of the primary court. The District Court can do so under section 22 (1) of the magistrate court Act cap 11 RE 2002 that reads thus:

22. Revisional jurisdiction

(1) A district court may call for and examine the record of any proceedings in the primary court established for the district for which it is itself established, and may examine the records and registers thereof, for the purposes of satisfying itself as to the correctness, legality or propriety

of any decision or order of the primary court, and as to the regularity of any proceedings therein, and may revise any such proceedings

It is clear from the record that the district court of Arusha under the auspices of her in charge Honorable Msoffe did exercise its revisionary power conferred to it by the law under the provision of section 22 (1) of the magistrate Court Act supra, and it was on the strength of such revision that the correctness and propriety as to whether the probate cause No 156/2009 was duly closed was ascertained. It was against that clear and transparent judicial process that the trial court equally exercised its mandate conferred to it under the provision of rule (2) (c) of the fifth schedule to Magistrate Court Act cap 11 RE 2002 to revoke the appointment of the administratrix in the best interest of the beneficiaries.

It was his further submission that, the situation would have been different if at all there was a water tight evidence from the Court proceedings revealing that the probate cause No 156/2009 was duly closed and in, blatant regard to that the Court proceeded to entertain the complainant that would have amounted to serious abuse of court process competent enough to prompt this honorable court to intervene. The situation before this court is patently different and distinguishable there is completely no viable and uncontroverted legal proof that Shauri La Mirathi No 156/2009 was duly closed on 15th November, 2015. The available evidence is probate cause No 156/2006 that in a real sense does not tally with the court proceedings and using the same to conclude with certainty that it was closed is as good as ascribing to a view that court proceedings

is of no use and cannot be relied upon to help the court to ascertain the reality in the state of uncertainty like the one at hand, if court proceeding is anything to go by, and if court proceeding is a real a replication of what transpire in Court it is emphatically that the District Court in charge acted judiciously and within the confine of law to rely on civil proceeding to arrive to a conclusion.

He further submitted that, Even if it is assumed for the purposes of argument that the administratrix did fully close the probate case, and that Shauri la Mirathi No 156/2006 was a mere mis numbering and that there was no need to examine court record and to look and the proceeding to verify its property, the main argument still remain that the court did substantive justice and there was no any mis carriage of justice done to the administratrix who in her own admission revealed to the court to have filed double version of inventory, in that sense, the revocation made by the trial court was well founded on law. The complainant demonstrated to the court how their interest was in danger. The evidence of filing double inventory was a conclusive proof of mis management therefore the disqualification met the end of justice.

In his written submission he did re iterate that upon presenting a copy of court order dated 15th November 2015 styled as Shauri la Mirathi No 156/2006 which was essentially disputing the complaint of non-closure of the probate cause presented before the trial court, it turned out that the same was inconsistence with the court record. In a nutshell there was an inconsistence not only between the numbers but between the magistrate who initially presided over the matter and the one who gave the order. The

inconsistency between the complainant who complained to have not been summoned and the order that revealed that they were present.

Embarking on the relevancy and applicability of the five judicial authorities cited by the appellant counsel to the fact and circumstance of the case at hand it was the learned counsel submission that all of the five authorities are hopelessly irrelevant and none of the five, can be relied upon to faulty the lower courts for having based on proceedings to find that the probate case No 156/2006 was at no point in time closed. Starting with the case of **GAP OIL (TANZANIA) Limited** Civil appeal No 9/2000 the GAP OIL CASE, was all about mis description of parties instead of using the word appellant the record of appeal used the word applicant. The court characterized the same as clerical error and ordered that the same be rectified. The notable different between GAP OIL CASE and present appeal is that in the present case there is a serious departure not a mere mis naming of case or parties but rather the issue of legitimacy correctness and propriety. It is all about non availability of Court proceedings to be relied upon to verify and justify the order.

It is was his further submission that, the departure in the present case is a serious illegality and irregularity which does not fall in slip rule. It is impracticable for this honorable court at this stage to order the trial court to go and convene itself to find the parties in Coram to take or insert a fresh proceeding which never existed before and for which there is no a conclusive prove to have taken place. Another Court of Appeal decision cited by the appellant counsel is the case of **Godbless Jonathan Lema VS Mussa Hamisi Mkangu & 2 Others** civil appeal no 47/2012. In

LEMA's case it was all about disagreement between the decree and judgment the inconsistency was not on the substance but rather on mixed up on legal provision the court characterized the discrepancies as a clerical error and curable defect. He submitted that, the notable difference between the LEMA case and the present appeal is that magnitude of departure and irregularity it is not about mixing up of section but rather a total nonexistence of court proceeding to affirm and confirm that the trial court constituted itself for probate cause no 156/2009 on 15th November 2015, and that the matter at hand cannot fall under slip rule for it is more than case numbering even if this court orders today that the probate cause No. 156/2006 be rectified to read as 156/2009 that rectification will not cover up for the lack of court proceedings apparent on record.

He further submitted that, it is eminently important to note that, the heart of the dispute at the trial court between the administratrix and complainant was whether she closed the matter and the conclusive evidence for such is court proceeding which does not exist.

Responding to the appellant submission on 2, 3 and 6 grounds of appeal it was the learned counsel for the respondent submission that, from the overall evidence adduced before the trial court the evidence for respondent was of higher evidential value and proved beyond scintilla of doubt that the administration did not manage deceased estate properly as can be reflected at page 4, paragraph 2 of the typed proceedings the applicant 1st witness had this to say;-

..... Mimi ni mtoto wa marehemu wa mwisho na tulikubaliana na kuleta mgawanyo wa mali ambao uliridhiwa na familia na kumkabidhi SU1. Alibadilisha kwenye baadhi ya maeneo jambo ambalo limeleta utata na mgogoro mkubwa kifamilia. SU1 alileta mgawanyo wa aina mbili kwenye jalada moja la Mirathi naomba kutoa kopi ya migawanyo

Mjibu maombi – sina pingamizi

Mahakama – migawanyo imepokelewa kwa pamoja

Again at page 6 the last paragraph of the typed proceedings the applicant 2nd witness had this to say;-

Mimi ni baba yao mdogo waleta maombi na pia mimi ni mwenyekiti wa ukoo.hajawai kugawa mali na sisi ukoo tukathibitisha, sina taarifa kama Mirathi hii imefungwa , aliitwa kwenye kiako na hakuja.

At page 7 the last paragraph of the typed proceedings the applicant 3rd witness had this to say;-

Waleta maombi ni watoto wa kaka yangu tangu ateuliwe hatujawahi kumwona tena na amegawa peke yake na hadi leo ni malalamiko tunaletewa kama ukoo na tukimwita hataki.

At page 8 first paragraph of the typed proceedings the applicant 4th witness had this to say;-

Mimi ni katibu wa ukoo na baba mdogo wa watoto aligawa mali za kampuni ya maro hajui mali zote za marehemu amesababisha migogoro mingi kwa kutojua mali za marehemu kuna mali ambazo zilikuwa ni za kampuni ambazo ni mfahamiko co tulikuwa tunamwita haji.

Again at page 9 second paragraph of the typed proceedings the applicant 5th witness had this to say;-

Mimi ni motto wa marehemu wa tatu baada ya kuteuliwa msimamizi wa Mirathi aliorodhesha mali za marehemu hakurudi tena nyuma kutukabidhi kila mmoja sehemu yake ya urithi hakuna mmoja wetu aliyewai kukabidhiwa wala kuwa na nyaraka za mali tulizokabidhiwa hivyo tumekuwa tukijiuliza kitu gani tumepewa.

At page 10 second paragraph of the typed proceedings the applicant 5th witness had this to say;-

Mimi ni mtoto wa tano kwenye familia ameandika mali na hajagawa pia hajafatilia madeni ya marehemu.

It was his submission that, looking critically at the overall evidence adduced by the witnesses for Applicant it is clear that there is indeed a prima facie case The administratrix defense is found at page 12 and 13 of the typed proceedings and for avoidance of doubt he quoted some segment from her testimony in court, that reads thus;-

> **..... baada ya kuteuliwa nilienda kwenye ukoo kutambua mali za marehemmu kwani nilikuwa sizijui.**
>
> **.....Niliendelea na usimamizi wa Mirathi niligawa mali kama ilivyokuwa imekusudiwa nilileta Form V mbele ya mahakama.**
>
> **Kutokana na wadogo zangu walikuwa wameshauza mali nyingi na kutawanya mali walizokuwa wameuza ikawapelekea wao kukosa mali**

From the overall evidence adduced by the Administratrix it is clear that, she failed to give any sufficient response worth of exonerating her from negligence. She never ever administered the estate in the best interest of the beneficiary either intentionally or out of sheer negligence. She did skip very substantial part of administration which is to collect all the properties of the deceased which would even include instituting the legal action against people or persons who were possessing or holding deceased estate illegality. He did refer this court to the case of **SAFINIELI CLEOPA VS JOHN KADEGHE** 1984 TLR 198 HC, where the Court held that:

"failure to account for the whereabouts of other properties in the custody of the administrator amounts to misapplication of the estate and administrator who misapplies the estate of the deceased or subjects it to a loss or damage is liable to make good such loss or damage".

It was his further submission that, in the matter at hand the trial court revoked the appointment of the administratrix on the basis of misapplication and the evidence on record reveal that she not only failed to account for the whereabouts of the asserts but she failed to collect all the assets as well as to distribute them fairly and equitably. Therefore the trial court revocation was fair and verifiable on the merit of evidence presented before it. It was his prayers that the appeal be dismissed with costs.

I have considered the appeal and the written submissions by the learned counsels. The appellant's grounds of appeal raise two main issues;-

1. Whether the Probate cause NO. 156/2009 was closed before the revocation and the primary court magistrate was functus officio.
2. Whether there was enough evidence for revocation by the primary court.

On the question whether probate 156/2009 was closed before revocation, the answer to this question can be gathered from the evidence reflected on the trial court record. It is on record that, the appellant RITA ALEX MARO was approved by her clan member to take out administration proceedings in the Estate of her mother One ANASTAZIA ALEX.

The appellant filed an application before Arusha Urban Primary court to be appointed as administratrix, which was probate cause no 156/2009. On 04/09/2009 she was dully appointed as an administratrix. After the appointment she was supposed to perform her duties as administratrix by filling forms No V and VI and filed them in court on time.

It is on record that the respondent filed objection proceedings as they were not satisfied with the appellant conducts as the administratrix. From the testimonies of the objectors and the Exhibits PI (two inventories) and Exhb. P2 "Muhtasari wa kikao cha mgao" the trial court revoked the appointment of the administratrix.

Now, the question is was the Probate Cause no 156/2009 closed before the revocation of the appointment of the appellant? I have gone through the record indeed, there is no court proceeding in support of the same. There is no record to show that the probate was ever closed. The court proceedings should have reflected this fact; this includes the proof that the beneficiaries were summoned before such closure, as it has been a practice that when administrator or administratrix file the inventories i.e forms No. V/VI the beneficiaries are summoned to the court to prove if what has been filled in by the administrator is what really transpired. I have gone through the Arusha Urban Court Primary court proceedings; I have not seen any proceedings showing that the beneficiaries were summoned to appear before the court and that the Court closed probate cause No. 156/2009.

Furthermore it is on record that, Arusha urban court referred the matter to the District Resident Magistrate In charge (DRMI/C) for directives

as to whether probate cause No 156/2009 was closed or not. Having gone through the trial court record the DRMI/C arrived to the conclusion that, the said probate cause was not closed as there was no proceedings for such closure. The DRMI/C directed the urban trial court to proceed with the hearing of complaint against the administratrix and determine the same on merit. This is what the DRMI/C directed:

> *"Nimekagua jalada husika yaani Mirathi No 156/2009 haswa jalada halisi kwani ndilo tunalopaswa kulizingatia ikiwa ni pamoja na kupitia mwenendo wa shauri la Mirathi No 156/2009 hauoneshi Mirathi hii kuwahi kufungwa, hivo endelea kusikiliza pingamizi hilo na ulitolee maamuzi"*

From the chain of events, I am of the opinion that the probate cause No 156/2009 was never closed before revocation as I have not seen the court proceedings worth being relied upon to establish that the said probate cause no 156/2009 was closed in November 2015. It is absurd that the other hand written proceedings regarding "Shauri la Mirathi No 156/2009" can be traced but the proceedings for proof that the probate cause was closed cannot be traced. I will not buy the appellant's counsel argument that nonexistence of a hand written is due to technological advancement, why other handwritten proceedings are available except for the closed proceedings of "Shauri la Mirathi Na 156/2009". It should be known that, it is through the court proceedings the higher court can know what really transpired and verify the existence of the court judgment and order.

In the absence of court proceedings to verify that the matter was closed and that the beneficiaries were summoned to state whether they are contending the distribution of the properties by the administratrix my conclusion is that the probate cause No 156/2009 was never closed before the appellant's revocation.

Coming now to the issue as to whether there was enough evidence for revocation of grant of administration by the primary court. The primary court record shows that, after the appellant was appointed as administratrix of the estate of late Annastazia Alex, after the appointment she did not perform her duties as administratrix by filling forms No V/VI in court on time. It is on record that, the respondents filed objection proceedings and during hearing of the same it was revealed that the administratrix filed two different inventories, with different particulars. This shows how the administratrix of the estate has not been administering the deceased estate properly and in accordance to the law. From the trial court record the conduct of the appellant as administratrix is highly questionable and very doubtful as the very same person who was trusted to be an administratrix filed two documents contradicting each other. Her integrity is questionable as it seems she was intending to defraud and temper with deceased's estate.

Much more from testimonies of the respondents, it is quite clear that the respondents who are beneficiaries of the estate of Annastazia Maro have totally lost faith in Rita Alex Maro (the appellant) who was appointed administratrix of the said deceased estate. It is quite plain also that her

conduct in administration of the deceased estate is highly questionable and very doubtful.

It is my opinion that, her conduct of filing two inventories with different particulars disqualifies her from continuing to be administratrix of the deceased estate. The trial court was very right in revoking her appointment as administratrix. I see no reason to fault the same.

In the upshot I hereby uphold the decision of both lower courts below. The present appeal lacks merits and the same is dismissed with costs.

Ordered Accordingly.

S.C. MOSHI

JUDGE

09/08/2018