IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

PC. CIVIL APPEAL NO. 86 OF 2018

(Arising from Probate Appeal No. 01 of 2018 Bagamoyo District Court Makube – SRM)

HENRY MTEI & OTHERS.....APPELLANT

VERSUS

WAZIRI MANENO CHOKA.....RESPONDENT

JUDGMENT

Date of last order 24/09/2019
Date of Judgment 15/10/2019

NGWALA, J.

The appellants are aggrieved by the decision of Bagamoyo District Court. Their Petition of Appeal raises two grounds of appeal, namely:-

1. The trial Magistrate erred in law and fact by dismissing the Appeal.
2. The trial Magistrate erred in law and fact by condemning the Appellants unheard.

The background of this appeal is that, the appellant appealed to the District Court of Bagamoyo against the appointment of the

respondent, as the administrator of the estate of the late Salma Mbaraka in "Mirathi Na. 31 of 2018". It is in the proceedings on record dated 25th April 2018 that, in the absence of the appellants, the respondent told the court that, the appellants were appealing against "*Mirathi Na. 2/2017*" in which both of them were not parties. It was on that account the District Court dismissed the Appeal without affording the appellants the a right to be heard, on the ground that the administrator had informed the court that he was appointed the Administrator in Probate No. 31/2014 and not No. 2/2017.

At the hearing of this Appeal, both parties were unrepresented. The appellants stated that, the District Magistrate dismissed their Appeal unheard on the ground that, they cited a wrong number of the case. They stressed out the appellate Magistrate could have given them an opportunity to rectify the number and accord them the right to be heard. It was on that basis they prayed this court to set aside the said Judgment in order to accord them an opportunity of being heard. They also prayed for an order that each party bear its own costs.

In reply the respondent argued that, the appellants in the District Court were appealing against Mirathi No. 2/2017. The court held that they were all not parties to the suit. For that fact, the

Appeal was dismissed because the Magistrate found that the case involved was *"Mirathi Na. 31 of 2014'* and not *'Mirathi No. 2/2017'.* Thus the respondent supported the decision of the trial court and prayed for costs of the Appeal.

To start with the ground that the appellants were, unheard, it is a trite law that a person should not be condemned unheard. This is a principle of natural justice which temples of justice should not overlook. The omission to give them that opportunity violates the provisions of **Article 13(6)(a) of the Constitution of the United Republic of Tanzania of 1971** that reads.

> *"(6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely*
>
> *(a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned".*

There can be no doubt whatsoever that, the omission by the trial court to provide the appellant with a right to be heard by the trial

court was a very serious incurable mistake as it violated the fundamental right of equality before the law as quoted above.

The importance of the right to be heard has been emphasized for centuries as held by Meggary, J. in **R v University of Cambridge, 1723, 1 Stra. 557** cited with approval in **John v Rees and others, [1969] 2 All E.R. 274** by Vortescue, J., in celebrated words:

> *"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion that even God himself did not pass sentence upon Adam before he was called upon to make his defence. Adam (says God) where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldst not eat? And the same question was put to Eve also."*

I'm satisfied, for the reasons I have given, that there is merit in the complaint in the second ground of appeal.

Finally, I proceed to deal with the first ground of appeal, on dismissal of the appeal on the reasons stated by the first appellate court. The District Court, in exercising its appellate

jurisdiction was supposed to direct its minds on whether in the circumstances of a party citing a wrong number of the case, the appeal had to be dismissed or otherwise. This appeal therefore raise a very important point on the distinction between the effect of an order striking out and appeal and dismissing an appeal without hearing it on merit.

Distinguishing the two orders in the case of **NGONI – MATENGO COOPERATIVE MARKETING UNION LIMITED v. ALIMOHAMED OSMMAN [1959] E. A 577** at page 580 the East African Court of Appeal held;

> *"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 strictly to have done in each case was to "**strike out**" the appeal as being incompetent, rather than to have "**dismissed**" it for the latter 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".*

In another case of **OLAM UGANDA LIMITED (Suing through its Attorney United Youth Shipping Company**

Limited) v. TANZANIA HARBOURS AUTHORITY, CAT, Civil Appeal No. 57 of 2007 the Court held;

> *"In our considered opinion then, the dismissal amounted to a conclusive determination of the suit by the High Court as it was found to be not legally sustainable. The appellant cannot refile another suit against the respondent based on the same cause of action unless and until the dismissal order has been vacated either on review by the same Court or on appeal or revision, by this Court".*

In the view of the cited authorities, it is noted that the dismissal order by the District Court on that matter which was not disposed of on merit was wrong as that court order to struck out which has the effect that the matter can be refilled after rectifying that curable error in proper forum for its determination on merit. In this case the appellate Magistrate dismissed the appeal instead of striking it out. Thus the appellants were denied the opportunity to refile the same. The only forum that remains for them is an appeal, when a successful dismissal order is set aside by a by a court of competent jurisdiction to enable the aggrieved party an opportunity to be heard. The reason for making an order to strike out a suit, or a case, an application or appeal is to enable a party to take appropriate steps or to comply with the law in order

to regularize a suit that has been found incompetent in accordance with the requirements of the law.

For the said reasons I also find the second ground of appeal to be meritorious.

In the final event, this appeal is allowed. The dismissal order is hereby set aside with a consequential order, that, the appellants, if they so wish should file a fresh appeal in the said District Court within 21 days from the date of this Judgment. The said appeal should be determined by another magistrate. Each Party shall bear its own costs.

A. F. Ngwala

JUDGE

15/10/2019

15/10/2019

Coram: Hon. A. F. Ngwala, J.

Appellants - Present

Respondent - Present

Court: Judgment read in court in the presence of the parties.

Court: Right of Appeal to Court of Appeal of Tanzania explained.

A. F. Ngwala

JUDGE

15/10/2019