

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 506 OF 2019
(Originating from Misc. Civil Application No. 671 of 2018)**

**IN THE MATTER OF THE ESTATE OF THE LATE: SALIM
HAMDUN SAID**

AND

**IN THE MATTER OF APPLICATION FOR REVOCATION OF
GRANT OF THE LETTERS OF ADMINISTRATION TO
HAMDUNI SALIM HAMDUNI AND SHAMSA SALIM
HAMDUNI**

BETWEEN

SHAMSA SALIM HAMDUNIAPPLICANT

VERSUS

**THE ADMINISTRATOR GENERAL1ST RESPONDENT
HAMDUNI SALIM HAMDUNI2ND RESPONDENT**

Date of the Last Order: 7/11/2019

Date of the Ruling: 14/2/2020

R U L I N G

MGONYA, J.

Before the Court is an Application for setting aside an *Exparte* Ruling delivered on 8th August, 2019 in respect of the **Misc. Civil Application No. 671 of 2018**. The Application has been preferred under **Order IX Rule 13 (1) of the Civil**

Procedure Code, Cap. 33 [R. E. 2002]; and supported by the affidavit of **Shamsa Salim Hamduni**, the Applicant herein.

In this Application, the Applicant is represented by different learned Counsel from ASYLA Attorneys whereas the 1st Respondent is represented by the learned State Attorneys from the Office of Administrator General Registration Insolvency and Trusteeship Agency (RITA) while the 2nd Respondent is represented by the learned Advocate Mr. El Maamry.

As this is an Application for setting aside the *Exparte* Ruling against the interests of the Applicant herein, the law requires the Applicant to show the good cause to convince the court to set aside the *Exparte* Ruling which is now subject of this Application.

In order to appreciate the reason by the Applicant to pray for the court to set aside the *Exparte* Ruling, I have gone through paragraph **20** of the Applicant's Affidavit, which for good understanding, deserves to be quoted:-

"20. I could not failed to enter appearance and file counter affidavit in Misc. Application No. 761 of 2018 had I been served with the Application."

The above reason prompted the Applicant to seek the redress on the following reliefs paused in the Applicant's Chamber Summons. They read:

- i. That this honorable court may be pleased to set aside the Ex-parte ruling and order of this court (Hon. Mgonya, J.) dated 23rd August 2019 in Miscl. Application No. 671 of 2018;***
- ii. Costs be provided for; and***
- iii. Any other orders or reliefs as the Honorable Court may deem just and fair to grant.***

I have to confess and make comfortable the parties that I have carefully read their entire respective written submissions of which I don't have any intension of reproducing the same in this Ruling, but rather to determine the Application before the court.

In this regard, and coming back to the reason that prompted this court to give its order and the reason as to why ***Miscl. Application No. 671 of 2018*** was to proceed *Exparte*, I had to consult the record of the above Application to see as what happened, and who was before the court before I gave out the said order. The record of this court reveals that on **9/4/2019** when the matter was called before Hon. Magoiga J. who was presiding the matter, Mr. Mutabazi the learned State Attorney for the Applicant prayed for an order to reserve the Respondents as they were both absent during the proceedings on that day. Three orders were given in that respect. The first one was that the matter was scheduled for mention on **18/6/2019**. Second, that

Respondents be served and summons be issued; while the last order was for the case file be placed before Hon. Ji/c for reassignment following the presiding Judge transfer to another work station.

The record further reveals that, on **18/6 /2019** when the matter was called for mention before Hon. Deputy Registrar, the Applicant was represented by Ms. Clementina Rushela, the learned State Attorney the 1st Respondent was absent while the 2nd Respondent, the Applicant herein was represented by Advocate Lusiu respectively. It is on that particular date, Hon. Deputy Registrar ordered that **Hearing** of the Application was to take place on **31/7/2019**.

The said order reads, and I quote:

***"Order- Hearing on 31/7/2019."
(Signed)
DR
18/6/2019."***

It is my considered view that, since every party to the Application was represented, then, the Deputy Registrar was not expected to issue any order with regard of servicing or summoning any party to the said proceedings. This is because all the Parties representatives were there and indeed they had a

prior knowledge of the Hearing date scheduled by the Deputy Registrar.

At this juncture I have to say that, according to the court's record, the Applicant's Counsel was in court on that day. Further, he witnesses the entire proceedings regardless as of how he got information that on that particular day the matter which they also have interest was called for proceedings. Since that was the case, the 2nd Respondent's Counsel as other learned Counsel were expected to appear for hearing of Application on **31/7/2019** without any further notification.

Further, from the above court record, it is not disputed at all that the 2nd Respondent's Counsel was before the court and the issue of service here cannot stand as already the Counsel was physically in court.

The court record further reveals that, on the said hearing date, that is on **31/7/2019**, before me, the Applicant was represented by Mr. Mutabazi, the learned State Attorney, the 1st Respondent was represented by Mr. Ahmed Elmaamry while for the 2nd Responded, neither the Respondent herself nor her Advocate appeared for proceedings/Hearing as scheduled. It is from the 2nd Respondent's absence under the above mentioned circumstances, the Applicant's Counsel Mr. Mutabazi prayed for an order that the matter before the court proceed *Exparte* against

the 2nd Respondent. Consequently, I granted the same; and automatically, this is where the *Exparte* Ruling emanates.

I have decided to take time to go through the court's record in respect of **Miscl. Civil Application No. 671 of 2018** to trace the truth behind the issue of service to the Applicant's (the 2nd Respondent's) side and all the matters that followed thereafter. Indeed, the above scenario is what transpired before the *Exparte* Ruling.

Now, since the major reason of the prayer to set aside *Exparte* Ruling was lack of service to the Respondent therein, then, from the above, it is my firm view that, under the above stated circumstances, the advanced reason cannot stand or rather be taken for consideration. Had it be that there was any other reason that would have task the court to set aside its *Exparte* Ruling such as error on the face of the Ruling or any other legal error that have been detected in the same, I could have also look on those other factors considerably and respectively. Since, there is no any other reason in this respect, I proceed to state that, under the given circumstances, I find no justifiable reason advanced by the Applicant to constitute good cause to warrant this Court to exercise its legal discretion to set aside an *Exparte* Ruling of this Court dated 23rd day of August, 2019.

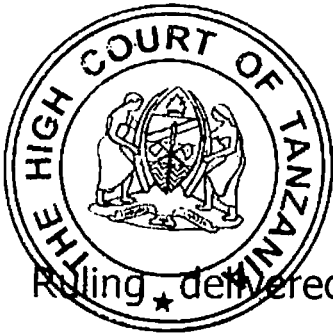
Before I conclude, I have to remind the Parties and their respective Counsel that, despite that in most cases the courts insists on the substantial justice in place of legal procedures, it is important to note that the rules of procedures too most of the time are important tools for the courts to conduct its procedures towards justice. Had it be that there are no rules of procedures that are to be followed by parties before the courts, it could have been chaos on to the parties' disputes, and the court could have nothing at hand to hold or rather to manage the situations. In the event therefore, I urge parties and their respective counsel to observe the rules of procedure during court proceedings in order to serve time and energy that we can progress into another matters.

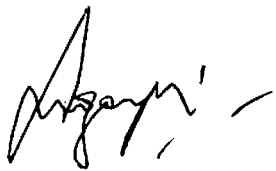
Since the reason that was holding this application has no legs to stand as I have declared above, I also wish to state that, even if the reason was to be extended to the substantive law reasoning, meaning that I had to give the reasoning to my previous decision, the previous decision would have to stand. I say so since, it wasn't just making decision to grant the prayer sought but rather I was convinced with the reasons given by the Applicant that had surrounded the estate of the deceased which prompted the 1st Respondent therein also to support the Applicant.

At this juncture, I had to admit therefore that, in legal themes, both substantive and procedural rules are very important, and that one cannot do without the other as they complement each other to accomplish justice.

Having said so, the Application is **accordingly dismissed with costs.**


It is so ordered.




L. E. MGONYA
JUDGE
14/02/2020

Court: Ruling delivered in the presence of Aziza Elmaary, Advocate for the Applicant, Clementina Rishala, Advocate for the 1st Respondent, 2nd Respondent in person and Ms. Janet Bench Clarke in my chamber today 14th February, 2020.




L. E. MGONYA
JUDGE
14/02/2020