

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

CIVIL APPEAL NO. 230 OF 2019

(Arising from the Ruling and Order of Kinondoni District Court (Mushi RM) in
Matrimonial Appeal No. 16 of 2019)

SALEHE SALUM ALLY..... APPELLANT
VERSUS
FATUMA SALUM ALLY.....RESPONDENT

JUDGMENT

Date of Last Order: 10/12/2020

Date of Judgment: 19/2/2021

MASABO, J.:

In probate Cause No. 527 of 2018 before Temeke primary court, the respondent was granted letters of administration of the estate of his father Salum Ally Mohamed who died interstate. His appointment was short lived as the letters were nullified by the District Court of Temeke. Being unhappy, he is now before this court armed with 4 grounds of appeal:

1. That, the Resident magistrate erred in law and in fact when he ordered this matter to start with the proceedings from 29/11/2018 while the said appeal in the alleged proceeding was filed out of time by the respondent in Civil Appeal No. 18/2019 and ordered to refile the same without follow the procedure.

2. That, the Resident magistrate erred in law and fact when he ordered the matter to start with proceedings in allegation that the respondent's caveat was not given opportunity to be heard where the respondent was the Appellant, without considering that, the said caveat was no merit.
3. That, the Resident magistrate was wrong in law and misdirected himself to order the matter to start with the proceedings upon the objection raised by the respondent against the appointment of the appellant to administer the deceased's properties, without considering that, the alleged properties such as motorcycle and business frame are not present even though the respondent failed to bring any single witness to prove the said properties.
4. That, the Resident erred in law and fact when he did not consider that the caveat raised on point of law by one JUMA SALUM ALLY the first born of the deceased who has been given the said house No. MTN/M/328 situated at Mtoni by his late father SALUM ALLY MOHAMED since 1989, as a gift.
5. That the Resident magistrate was wrong in law and fact when he nullified the decision of the trial court while

reasoning and logic given on his outcome of the matter, shows that he was biased against the appellant.

When the appeal was called on for hearing, both parties appeared unrepresented. Being lay, they had nothing useful to add to the grounds of appeal. The appellant told the court that he has no knowledge of the details of the grounds of appeal as the memorandum of appeal was prepared by an advocate but all he knows is that the respondent who is his half-sister is very difficult to deal with. On her part, the respondent told the court that he is surprised why they are before this court as to her recollection, the district court ordered them to return to the trial court.

There being no submission from the parties, I will proceed to determine the grounds based solely on records from lower courts. Before embarking on this task, I will give a brief background of the facts leading to this appeal as deciphered from the record.

The parties are among the six children of the late Salum Ally Mohamed the other four children being Juma Salum, Mohamed Salum, Mkejina Salum and Zuhura Salum. After the death of their father, the Respondent petitioned for letters of administration before Temeke primary court. The Appellant and Juma Salum entered a caveat objecting her appointment. When the parties appeared before the court on 10th December 2018, the trial magistrate having heard the appellant and the said Juma Salum, made the following order:

'shauri hili tarehe 20/12/2018 warithi wakakae kikao cha kumteua msimamizi wa mirathi.'

Acting on this order, on 19/12/2018, the family convened a meeting and, allegedly, nominated the appellant herein as potential candidate for appointment as administrator. On 28/12/2018 hearing of the probate court resumed whereby, the appellant was recorded as petitioner while the respondent who was the original petitioner, testified as a witness (PW5). In the end, the letters of administration were granted to the Appellant on 28th January 2019 (copy of judgment certified on 18/2/2019).

On 13th June 2019, the respondent appealed to the district court armed with two grounds, that is: **First**, the court erred by not considering her objection to the appointment of the appellant, and, **second**, the court erred in failure to consider that the appellant omitted some of the deceased's assets from the list submitted in court. Upon being served with the petition of appeal, the appellant raised a preliminary objection on a point of law that the appeal was hopelessly out of time. But, on 21/10/2019 while appearing before the court he expressed his intention to abandon the preliminary objection and the same was marked abandoned. The appeal proceeded to a hearing which ended in favour of the respondent.

With these facts, I am now ready to determine the grounds of appeal. In the first ground of appeal, the appellant has complained that the first appeal court wrongly entertained the appeal as it was filed out of time and without

following the requisite procedures. The ground is not new. As could be seen in the narration above, it is on record that the appellant raised this point in the first appellate court but abandoned which implies that he found it not worth of pursuit. To this point, I find no relevance to be detained on this point. Having abandoned it in the first appellate court he cannot resurrect it at this stage.

Regarding the second ground, I have observed as per the narrative above, the proceedings had several irregularities the major one revolving around the respondent's right to be heard which is paramount in the dispensation of justice. It is settled law in our jurisdiction that, a person should not be condemned without being afforded the right to be heard. Articulating this principle in *I.P.T.L. v. **Standard Chartered Bank***, Civil Revision No.1 of 2009 (unreported) the Court of Appeal stated that:

"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"

The failure to comply with this rule, attracts severe consequences as it vitiates the proceedings and the decision/judgment so rendered. Faced by a similar scenario in ***TANG Gas Distributors Limited v Mohamed Salim Said and 2others***, Civil Application for Revision No. 68 of 201, the Court of Appeal had this to say on the consequences:

What then are the consequences of a breach of this principle? Settled law is to the effect that, its breach

or violation, unless expressly or impliedly authorised by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had the party been heard.

In the present case, the record clearly demonstrate that the respondent's views were not obtained prior to the court's order that the parties convene a family meeting. When the parties appeared before the court on 10th December 2018 the court did not afford her the right to be heard. Only two persons, the appellant and one Juma Salum were heard on the material date and on the basis of their submission, the court stayed the proceedings and ordered the parties to convene the family meeting. Being the party to the proceedings it was imperative that her views be heard. On the strength of the above authorities, there can be no better remedy than nullification of the proceedings and decisions of the trial court as they were rendered a nullity by the omission to hear the respondent. The finding of the first appeal court was correct and I see no reasons to differ. The second ground of appeal fails in entirety.

Having dismissed the first two grounds and having upheld the first appellate court's finding as to the legality of the proceedings, I would end here as the remaining grounds will add no value. However, before I pen off, I am captivated by another major irregularity in the trial court proceedings. The handling of the matter had glaring inconsistencies with the rules pertaining to contentious probates. Of particular interest is the change of status of parties. As the records will show, when hearing resumed on 28/12/2018 the

status of the appellant mysteriously changed from Caveator to Applicant thereby replacing the original applicant who was, as a result of these changes, reduced into a mere witness and testified as PW5. With this irregularity, it is impossible to sustain the proceedings of the trial court even in absence of discontentment as to the right to be heard.

In the final result, I dismiss the appeal in entirety and uphold the decree of the first appellate court.

DATED at DAR ES SALAAM this 19^h day of February 2021.



J.L. MASABO
JUDGE

