

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

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 227 OF 2020**

**MOZA GILBERT MUSHI.....1<sup>st</sup> APPELLANT**

**BACH JOHN MKEU.....2<sup>nd</sup> APPELLANT**

**VERSUS**

**LOYCE JOHN MKEU suing through Power of**

**Attorney by BILLIONAIRE JOHN MKEU.....RESPONDENT**

(From the decision of the District Court of Temeke)

**(Mushi, Esq- SRM)**

Dated 21<sup>th</sup> August 2020

in

Misc. Civil Application No.55 of 2020

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**JUDGEMENT**

17<sup>th</sup> June & 26<sup>th</sup> August 2021

**Rwizile, J.**

This appeal arises from a decision of the District Court. The appellants are disputing their revocation as administrators of the Estate of the late Ester John Mkeu. It is apparent Ester died intestate on 13<sup>th</sup> August 2013. She was survived by Moza Gilbert Mushi, Bach John Mkeu, Richard Reuben Lubanga Loyce John Mkeu and Rajeshi.

Following her burial, Billionaire John Mkeu,-now donated powers of attorney by the respondent was appointed an administrator in Probate and Administration Cause No. 28 of 2012 on 10<sup>th</sup> July 2014. The appellants successfully moved the same court via Misc. Civil Application No. 90 of 2018, to revoke his appointment which was done on 9<sup>th</sup> August 2019. The same instead were appointed. About 9 months following their appointment, suing through powers of attorney, donated to him by Loyce John Mkeu, Billionaire Mkeu successfully moved the same court to revoke the appellants appointment via Misc. Civil Application No. 55 of 2018.

The reasons for revocation were that the 2<sup>nd</sup> appellant was of unsound mind, that the grant were obtained by means of fraud, false suggestions and based on untrue allegations and for willfully neglect to exhibit an inventory. The respondent was in turn appointed as an administratrix of the estate. This decision aggrieved the appellants hence this appeal. Two grounds have been preferred namely;

- 1. The trial magistrate erred in law and fact by revoking letters of administration granted to the appellants on the ground that the appellants have failed to file return in time without taking into consideration that failure to file return was caused by the agent of the respondent herein instituting endless cases in relation to the deceased estate against the appellants.*
- 2. That the trial magistrate erred in law and fact by appointing the respondent as a sole administrator of estate of the late Esther John Mkeu without taking into consideration that the respondent is incapable of discharging her duties due to the old age of the respondent.*

To prosecute this appeal, Mr. Leslie Saliyana Koini of Msemo and Koini advocates and Mr. Alex Mashamba Balomi learned counsel represented the appellants and respondent respectively.

On 23<sup>rd</sup> February 2021, the court directed the preliminary objection raised by the respondent be argued along with the appeal by way of written submission. It is unfortunate that the respondent submitted on preliminary objection only. He did not submit on the appeal. In that case, not submitting on the appeal is as good as failure to defend the appeal, since the court directive was explicit on this point.

Submitting against the preliminary objection, the appellant argued that the objection has to be overruled. His reason was, the defect alleged by the respondent does not go to the root of the case. According to him, the respondent has not been prejudiced by the same. Asserting more he said, the defect is cured by overriding objective rule.

Learned advocate stated more that, courts are bound to deal with substantive justice and have to do away with technicalities. To support his arguments, he cited the case of **Yakobo Magoiga Gichere vs Peninah Yusuph**, Civil Appeal No.55/2017 and Article 107A (2) (e) of the Constitution. It is from the foregoing argument, the learned advocate prayed for the objection to be overruled.

In support of the appeal, Mr Koini learned advocate argued on the first ground that, appellant failed to file inventory due to numerous cases filed by the respondent regarding the estate. His opinion was, the trial court ought to have extended time for the same to be filed and not to revoke

them. He relied on the Probate and Administration of Estates Act, [Cap 352 R.E 2019] under the provision of section 107.

It was his submission on second ground that, the trial court erred in appointing respondent to be a new administrator, he said the same is too old to administer the estate. However, he added, even though respondent is being acting by attorney one Billionaire Mkeu, he said this attorney has a bad character. He asserted further that; the respondent has several pending cases regarding the estate filed before this court. He therefore prayed the appeal be allowed with costs.

In reply and supporting the preliminary objection, Mr Sungwa learned advocate said, this appeal is incompetent for being filed by a *petition* instead of *memorandum*. He asserted, O.XXXIX of the CPC is coached in mandatory terms, that the appeal to the High court has to be filed by a memorandum of appeal. According to him, the defect is fatal. He added that court rules have to be obeyed and complied with. To support his argument, he cited the cases **Godwin Ndeisesi and Another vs Tanzania Audit Corporation**, Civil Application No.57 of 1994 and **Njake Enterprises Limited vs Blue Rock Limited and Another**, Civil Appeal No.69 of 2017.

He asserted that, since this objection is on the point of law, this appeal has to be dismissed so as to save time and costs to the parties. This defect, he argued, cannot be cured by overriding objectives rule. To support the same, he cited the cases of **Mukisa Biscuit Manufacturing Co. Ltd vs Westend Distributors Limited** [1969] E.A 696 and **Chama Cha Walimu Tanzania vs Ezekia Tom Oluochi**, Misc. Application No.49/2020 which cited the case of **Shahida Abdual Hassanali Kasam**

**vs Mahed Mihamed Gulamali Kanji**, Civil Appeal No.42 of 1999. The learned advocate prayed for the appeal to be dismissed with costs.

As I said before, respondent did not submit on the ground of appeal. The appellant when re-joining, he submitted on the same that, since respondent failed to submit on the grounds of appeal, it should be taken as to have entered no appearance. He therefore said, this appeal has to be heard exparte. He cited the case of **Famari Investment (T) Ltd vs Abdallah Seleman Komba**, Misc. Civil Appeal No.41 of 2018.

On my part upon taking through the submission, I must say I am in agreement with the respondent that O.XXXIX of CPC provides for memorandum to be filed when a party is appealing to the High Court. for ease reference the same states;

*1.-(1) Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court (hereinafter in this Order referred to as "the Court") or to such officer as it appoints in this behalf and the memorandum shall be accompanied by a copy of the decree appealed from and (unless the Court dispenses therewith) of the judgment on which it is founded.*

*(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the decree appealed from without any argument or narrative; and such grounds shall be numbered consecutively.*

Apparently, it is shown in the record that appellants filed *petition* instead of *memorandum*.

By the letter and spirit of the foregoing provision, I cannot deny the fact that, the proper wording in this respect would have been memorandum of appeal not otherwise. The appeal is therefore defective. But I have to certainly say, not all defect have the effect of defeating the suit. In this, however the question to be asked would be, how the said defect prejudice the respondent.

It is my considered view that, since it is by petition or memorandum which are used to file appeals. It is my view that, mistakes concerning naming the same amounts to technical or drafting errors which do not go to the root of the matter. For the same, respondent would not be prejudiced by the same.

It is said by overriding objective rule that, parties and courts are enjoined to consider substantive justice rather than entertaining technicalities. Rationale for the same is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. It is clearly provided under section 3A and 3B of [Cap 33 R.E 2019]. After what I have said above, it is my humble view that, the intention of the appellants herein was to appeal against what have prejudiced them. Failure to determining the same for the reason of defective memo, will give no meaning to facilitation of justice. For the foregoing, this objection is overruled. I have considered the submission on this party. I therefore feeling that the same objection is baseless and should not be entertained. Reasonably, it is a misplacement, since the effect of the same is in the absolute discretion of the court.

It defeats therefore the spirit of the case of **Mukisa Biscuits Manufacturing Co. Ltd V West End Distributor Ltd** (1966) EA 696 on what amounts to the preliminary objection.

Coming to the grounds of appeal, I propose to determine them together since they referred to the fact whether the trial court erred in revoking letters of administration to appellants and appoint the respondent. It is on record that, the district court of Temeke revoked letters of administration granted to appellants for the reasons that they failed to file inventory and that they presented false information. The trial court said, the same was contrary to section 107(1) of the Probate and Administration of Estate Act.

The appellants argument on the grounds were that, the trial court erred in revoking the grant to appellants and appointing the respondent as a new administrator. The learned advocate said, the trial court ought to have extended time for the inventory to be filed. It was argued also that, respondent is elderly who cannot administer the estate properly. He added that, even her attorney cannot administer the estate since he is of bad character.

From the above, I think I have to say, that grant of letters of administration can be revoked for the reasons provided under section 49(1) of the Act, which reads as hereunder;

*(1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons–*

*(a) that the proceedings to obtain the grant were defective in substance;*

*(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;*

*(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;*

*(d) that the grant has become useless and inoperative;*

*(e) that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect*

It is clearly shown in the record that, the appellant failed to file inventory in court. As far as this appeal is concerned there is no reason that suggest appellant wilfully neglected to file inventory. However, failure to file inventory is illegal, because it is against the clear provisions of the law. Still, it is not in all cases where the inventory and final accounts of the estate are not filed in time, the administrator has to be revoked. But worse enough, the respondent has never been before the court that granted her letters of administration. She is on record to have donated powers of attorney to Billionaire. It is of essence that administration of the estate, in my view cannot be done in representation. It is according to the law the administrator or administratrix has the duty personally granted to him or her. It should be recalled, if the applicant who was granted letters in her absence because of her old age, how will she then administer the estate.



The record shows and it has been averred that the same lives in Shinyanga and the properties to be administered are in Dar es salaam. It goes without saying therefore that, it is this same Billionaire John Mkeu, who was revoked by the same for being unscrupulous who has out of trick been appointed an administrator through the back door. I am therefore in agreement with Mr Koini learned advocate that, trial court ought to have extended time for the appellants to file inventory instead of doing what he did.

What I find to be unjustifiable is the fact that, revocation and appointment of the respondent was done on 21<sup>st</sup> August 2020. And after the grant, it is undisputed fact that administrator has to perform duties stated in Part XI of the Act, [cap 352 R.E 2002]. As for this appeal, after the perusal of the record I find the inventory and accounts of the estate of the deceased filed on 8<sup>th</sup> September 2020. Only within one month after the appointment.

A prudent question would be when and how respondent has managed to collect, distribute and pay expenses out of the estate only in one month. Even the law under provision of section 107(1) of Probate and administration of Estates Act, provides for six months after the grant, to file inventory and account of the estate in court. for ease reference the same states;

*An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint or require, exhibit in that court an inventory containing a full and true*

*estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and in the manner in which they have been applied or disposed of.*

It is from the foregoing I find the inventory and account of the estate of the late Esther Mkeu filed by the attorney of respondent to be unreasonable and doubtful and this proves, it is the same who is doing the duty that was proved to a total failure on his party. It is indeed unbecoming.

After what I have said above, I allow the appeal, quash and set aside the decision of the district court of Temeke. The appellants herein are given 6 months to complete the exercise. Otherwise, the same should be dealt with as per section 107(3) of the Act, first before revoking her appointment. The costs of this application be paid by the said Billionaire John Mkeu.

**AK. Rwizile**  
**Judge**  
**26.08. 2021**



 Recoverable Signature

X

Signed by: A.K.RWIZILE