IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF SONGEA

AT SONGEA

CIVIL REVISION NO. 02 OF 2021

(Arising from Songea District Court Misc. Civil Application No. 6 of 2017)

MOHAMED SAID MOHAMED..... APPLICANT

Versus

HASSAN AHMAD NASSORO LITUNU ..... FIRST RESPONDENT

ASHURA NASSORO LITUNU ..... SECOND RESPONDENT

RULING

Date of Last Order: 26/08/2021.

Date of Judgment: 02/09/2021.

BEFORE: S.C. MOSHI, J.

The applicant, Mohamed Said Nassoro approached this court seeking revision of the decision of the District court of Songea in Miscellaneous Civil Application No. 06 of 2017. He moved the court by way of chamber summons supported by an affidavit deposed by him. The application was made under section 43(2) and 44(1) (b) of the Magistrates Courts Act, Cap. 11 R. E. 2019.The applicant moved this court to call for and examine the proceedings and ruling of Songea District court in Miscellaneous Civil Application No. 06 of 2017 (Application No. 6/2017), he said that the same is tainted with errors material to the merits of the case involving injustice. The applicant also asked for costs.

The application was heard ex-parte by way of written submission following non appearance of the respondents. The applicant was represented by Mr. Edson Mbogoro, Advocate.

Mr. Mbogoro submitted among other things that, the first irregularity is failure by the District court to observe the rules of natural justice in denying the applicant the opportunity to be heard. He said that the District court before delivering its ruling it became aware of a letter written by the applicant requesting to be joined as a party in the application whose subject matter was his property to wit plot no. 11-12 Block K, Litunu Street Songea Municipality on 23-3-2017, it was received by the court registry on 28-03-2017 and minuted to the trial magistrate on the same date. He said that it is not known why the said letter came to the knowledge and attention of the trial Magistrate almost six weeks after being minuted to him. He said be it as it is, even at the said stage the said letter could have been acted upon and the applicant could have been joined in the application and heard since the ruling was yet to be delivered. He said that summoning the applicant to appear on the date of Ruling was a non starter and could even be construed negatively by the applicant.

In regards to breach of natural justice in respect of Mwahija Nassoro Litunu (Mwahija) the deceased, he said that in its ruling the

District court revoked and nullified two letters of administration in respect of the same estate that is one for the surviving Administratrix (the second respondent) and the other for an administratrix who at the time of revocation and nullification had already passed away after duly admistering the said estate including selling the property situated on plot no. 11-12 Block K, Songea Municipality to the applicant. He argued that, the second respondent was appointed an admistratrix of the estate of the deceased when there was nothing to administer as the only property for administration of the estate of the late Nassoro Litunu was plot no. 11-12 Block K Songea Urban.

He argued further that, by necessary implication of the law, the District court erred in revoking and annulling the appointment on administration of a deceased person. He cited section 51(1) of the Probate and Administration of Estate Act, Cap. 352 R.E 2019 and Rule 28(4) of the Probate Rules. He argued that this provision is to the effect that no revocation or annulment of a grant of probate or letters of administration may be made against a dead person as such person is incapable of surrendering the probate to the court which granted it. He added that because the ultimate order regarding the capacity of the said Mwahija Nassoro Litunu was that her appointment was revoked, the proper action to take was not to nullify what she did as administratrix

because by revoking her appointment, she lacked the capacity and legality from the date of revocation and therefore all acts done prior to the revocation were valid. He said that, it could only have been proper to nullify all the deeds she did in her capacity as administrator if and only if her appointment was nullified not revoked. He argued that, there is clear distinction between revocation and nullification. He elaborated that, with nullification the matter becomes void ab initio but with revocation the legality ceases from the date of such revocation and does not affect acts done prior to such revocation. He said that, with the case at hand, the trial court confused the two terms and ended into giving wrong orders.

It was his submission that the requirement to comply with the rules of natural justice is of fundamental importance in our jurisprudence. In this respect he cited the case of **Sadiki Athumani vs. Republic** (1986) TLR 235 and the case of **Director of Public Prosecutions vs. Sabinis Inyasi Tesha and Raphael Tesha** (1993) TLR 237 where it was held that the right to be heard is very important one and the denial of it vitiates the proceedings.

He submitted further that in revoking the letters of administration granted to the late Mwahija Nassoro Litunu and the second respondent the trial court heavily relied on a copy of a will purported to have been

written by the deceased which on the face of it was dubious, so faint and as such hardly readable, and worse still the affidavit containing grounds as to why the original copy of the will was missing to the affidavit contained contradictory and irreconcilable averments as it was deponed in the first place that the original copy was lost or misplaced and later on it was said it was torn or mutilated. It was his submission that, despite the fact that the second respondent did not resist the application the trial court ought to have disregarded the said affidavit.

He said that, the last ground which the applicant relied upon and craved the court's intervention is footed on what is referred to as an abuse of the due process of law. He said that, in that application the applicant was a full blood brother of the respondent. The applicant engaged an advocate to prosecute the application. Upon being served, the applicant's full blood sister also engaged an advocate not to resist the application, but as it turned out to concede to it. One may wonder why did they decide to incur expenses by engaging advocates when as between them there was no *litis contestation*. However, it was submitted that behind the curtain the applicant and his sister were not fools in incurring expenses for an uncontested application. They had something up in their sleeves. The respondent in the said application applied for letters of administration for the estate of her deceased

grandfather Nassoro Litunu at a time when the previous administratrix Mwahija Nassoro Litunu had fully administered the said estate before demise; hence her application for letters of administration was mere preparation for enabling the applicant to lodge the said malafide application whose ruling would have affected the deceased administratrix but not the surviving administratrix as she had virtually administered nothing. Hence the target for the said application was to revoke and nullify the letters of administration of the voiceless Mwahija Nassoro Litunu following her demise which objective was achieved through the District court's ruling.

He finally submitted that, the application be granted since the trial court failed to determine the application before it on merits because the respondents had unreservedly admitted it in bad faith all allegations of the applicants despite the fact that there were manifest and glaring irregularities some of which were noted in passing by the District court itself the conduct which amounted to an abuse of the due process of law and court process.

The issue to be determined is whether the application has merits. First, I at the outset would like to point out that section 43(2) of the Magistrates' Act Cap. 11 R.E 2019 is irrelevant as it bars appeals or

revisions on any preliminary objection heard by the District court and Resident Magistrate court. It states that: -

> *"No appeal or application for revision shall lie against any preliminary or interlocutory decisions or order of the district or a court of Resident Magistrate unless such decision or order has the effect of finally determining the criminal charge or the suit."*

The proper section is section 44(1) (b) which provides thus, and I quote: -

> *"44(1) In addiction to any other powers in that behalf conferred upon the High court, The High court-*
>
> *(b) may, in any proceedings of a civil nature determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its own motion, if it appears that there has been an error material to the merits of the case involving injustice, revise the proceedings and make such decision or order therein as therein as it sees fit."*

The underlying object of the above provision of the law is to prevent subordinate courts from acting arbitrarily, capriciously, illegally or irregularly in the exercise of their jurisdiction. I have gone through the records of this file and the file from which this application for revision originates, the applicant seeks for revision of the matter which was before Songea District Court on the basis of violation of principles

of natural justice. Indeed, this court has power on its own motion or on application, if it appears that there has been an error material to the merits of the case involving injustice, to revise the proceedings and make such decision or order therein as it may think fit. See **Benedict Mabalanganya vs. Romwald Sanga**, Civil Application No. 1 of 2001, court of Appeal of Tanzania at Mbeya (Unreported). I have also keenly considered the submission made by the applicant's counsel in line with perusal of the records from the trial court to find out whether this application has merit or not.

It is common ground that, the applicant was not a party to the case subject to this revision, as the parties were Hassan Ahmed Nassoro Litunuu vs. Ashura Ahmad Nasoro Litunu (Ashura). It is settled law that it is the parties to the suit who have to be afforded the right to be heard. See the case of **Hussein Khan Bhai vs Kodi Ralph Siara,** Civil Revision No. 25 of 2014 Court of Appeal sitting at Arusha (Unreported). Where it was held that: -

> *"In the line with the audi alteram partem rule of natural justice, the court is required to accord the parties a full hearing before deciding the matter in dispute or issue at merit."*

This position was also reached in the cases which were cited by Mr. Mbogoro in his submission, the case of **Sadiki Athumani vs R**

(supra) and the case of Director of **Public Prosecuton vs. Sabinis Inyasi Tesha and Raphael J. Tesha** (supra). Therefore, for the applicant to be accorded with a right to be heard was firstly required to apply to the trial court to be joined as a party to the application according to the law. The procedure is that, he was supposed to prefer an application by way of chamber summons supported by an affidavit, see Order XLIII, Rule 2 of the Civil Procedure Act, Cap. 33 R.E 2019. Looking at the trial court's record the applicant didn't make such application rather he wrote a letter to the Resident Magistrate In charge on 28/3/2017 stating that he is the owner of plot number 11-12 Block K Litunu street Songea Urban and that the plot was subject to Misc. Civil Application No.06 of 2017. In that letter he stated clearly that, he is not a part to it and he asked the court to give him a notice on such application and an affidavit attached to it so that he can file a reply to it.

As indicated herein above, the applicant was not a party to application No. 06/ 2017. The question which raises here, is whether the applicant has any interest in the case, that is Application No. 06/2017.The applicant averred that, he is interested in the application because he is the owner of Plot Number 11-12 Block K, Litunu street, Songea Urban. However, the applicant did not illustrate how his property will be affected by the decision in Civil Application No. 6/2017.

Evidently, the prayers sought in Miscellaneous Application No. 6/2017 related to revocation of letters of administration in Probate No. 3 of 2010 and 23 of 2015, both of them were of District court of Songea, and for declaration that any action which were done by administratrix in respect of both cases null and void in view of fraud. In probate and Administration cause No. 3/2010, the administratrix was Mwahija Nassoro Litunu whereas in Probate and Administration Cause No. 23/2015 the administratrix was Ashura Nassoro Litunu. The application was not contested hence it was granted.

Apart from allegations of fraud, the court also found that the administratrix had not filed inventory and accounts of the estates. It therefore goes without saying that the administratrix hadn't exhibited in court the properties which were under the estate of the deceased.

Again, after a closer look at the transfer deed of the applicant's property, it is apparent that the property was transferred to him by Hafsa Seleman Nassoro Litunu and Zabibu Seleman Nassoro Litunu way back on 22nd June, 2010 whereas Mwahija Nasoro Litunu letters of administration were issued on 11th March, 2011.

Be as it may, there is nothing on record showing that any decision that would be arrived in Miscellaneous Application No. 6/2017 would affect the applicant, being joined in application No. 6/2017 could in no

way defend his interest in the property. As indicated above, the issue in Miscellaneous Application No. 6/2017 was revocation of letters of administration.

However, it is important to point out that if the applicant finds that his property is included in the deceased's estate, the proper cause to be taken is to sue the administrator/administratrix of the estate or the executor/executrix of the will after being approved by court in an administration cause or probate cause respectively. Now, going by the decision in Application No. 6/2017, at this point there is no administrator of the deceased's estates. Any person who wishes to administer the estate has to start with a clean slate, as all what was done prior to this decision was nullified.

It can be gathered from the record that Mwahija Nassoro was appointed administratrix on 7-2-2011. It's also on record that Ashura Nassoro Litunu was appointed administratrix after the demise of Mwahija Nassoro Litunu on 18/01/2016. It's apparent that both of them did not exhibit the inventory and accounts of the deceased Nassoro Litunu. This means that so far there is no evidence that applicant's property was among the deceased's estate properties.

However, if the applicant thinks that his ownership or rights over the property is interfered with in any way by the respondents, he is at

liberty to pursue his rights vide proper forums but he can't realize the claimed rights by him being joined in Application No. 6/2017.

Concerning the question of fraud, I refrain from interfering with the District court's decision because the issue was not contested. I have had an opportunity to read the record, quite frankly all what the counsel stated are mere assumptions that it is foul play played by the parties. There is no any material evidence to prove the allegations. As it is known courts do not act on speculations. Who asserts existence of any fact must prove it; see section 110 (1) and (2) of the Evidence Act, Cap. 6 R.E 2019.

Again, as far as section 51(1) of the Probate and Administration Act Cap. 352 and Rule 28(4) of the Probate Rules is concerned, Mr. Mbogoro was of the view that the court erred because it made an order against a dead person who cannot deliver the Probate or letters of administration of the deceased estates to the court. However, it is my view that his argument is misconceived as it is evident that the second respondent, Ashura Ahmad Nassoro was appointed to administer the estate of Nassoro Litunu after the passing of the previous administratrix, Mwahija Nassoro Litunu. As correctly pointed out by the trial magistrate Ashura did step into the shoes of Mwahija. Therefore, any claim against Mwahija could be defended by Ashura.

That said and done, I find that trial court's proceedings and ruling are correct, there are no material errors which caused injustice. In the event, I do hereby dismiss the application in its entirety with costs.

Right of Appeal is explained.

S.C. MOSHI

JUDGE

02/09/2021