

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**(TANGA DISTRICT REGISTRY)**

**AT TANGA**

**(PC) CIVIL APPEAL NO. 6 OF 2021**

*(Originating from the decision of Probate Appeal No. 02 of 2020, Lushoto District Court, arising from Probate and Administration Cause No. 29 of 2020, Dochi Primary Court)*

**ALLUY KASHERENTE.....APPELLANT**

***-VERSUS-***

**MIRAJI KASHERENTE.....RESPONDENT**

**JUDGMENT**

*Date of last order: 28/07/2021*  
*Date of Judgment: 06/09/2021*

**AGATHO, J.:**

The Appellant and Respondent being the children of the late Halfani Kasherente are tangled in a dispute over administration of their deceased father's estate. The Appellant had petitioned for and granted letters of administration of the estate of the late Halfani Kasherente in Dochi Primary Court within Lushoto District. The Respondent objected. The trial Court overruled the objection and went on appointing the Appellant as the administrator of the said estate. The Respondent was aggrieved and appealed to the District Court of Lushoto which nullified the proceedings of the trial Court due to irregularities in admitting and

handling of exhibits and also failure to observe the law on how to deal with objection and determination of application for letters of administration. The trial Court separated the two while the law requires them to be handled in the same document. Consequently, the District Court ordered the retrial. The Appellant was dissatisfied with the District Court's decision and appealed to this Court on the following grounds;

1. That the Honourable Court or Magistrate erred in law and facts in not determining the grounds of appeal and jumped to other matters.
2. That the Honourable Court or Magistrate erred in law and facts in entertaining and dealing with procedural technicalities and irrelevant irregularities instead of dealing with substance and fundamental issues of the dispute between the parties to replace or substitute the administrator of the estate.
3. That the Honourable Court or Magistrate erred in law and facts in setting aside the decision and nullifying the proceedings of Dochi Primary Court while there is nothing fatal to the case.

The appellant prayed for appeal to be allowed and decision of Dochi Primary Court be restored and the decision of the District Court of Lushoto be quashed. Since the parties were unrepresented by any

advocate, they prayed to argue their appeal by way of written submissions. The parties dully filed their written submissions.

The first ground of appeal is that the Honourable Court or Magistrate erred in law and facts in not determining the grounds of appeal and jumped to other matters. In fact, the first and seconds grounds of appeal are dealing with the same thing. While the first ground of appeal does not clearly state what are the other matters that the District Court examined and based its decision, the second ground of appeal mentions them being the procedural technicalities and irregularities.

The first and second grounds of appeal will be examined jointly. We ask ourselves whether the District Court of Lushoto instead of determining the grounds of appeal it jumped on to other matters. Whether the irregularities observed by the District Court of Lushoto go to the root of the case. The irregularities referred to are the improper admission of the exhibits, determination of the objection and the main application for the letters of administration was improper/faulty. These are requirements and procedures as it was held in the case of **Ally Juma vs Mwanaidi Juma, PC. Civil Appeal No. 47 of 2018 at page 3, High Court of Tanzania, Moshi Registry**. Therefore, failure to observe them may led to nullification of the trial and its decision.



As for the Appellant's argument that he was sued in his personal capacity, this is not true, the District Court appeal is clearly marked Probate Appeal No. 02/2020 arising from Probate Case No. 29 of 2020 of Dochi Primary Court.

In the case of **Tonga Fueta v Steven Pwele Showe, Civil Appeal No. 246 of 2018 in HC of Tanzania Dar es salaam District Registry at Dar es Salaam (unreported)** it was held that the administrator of estate for any dispute relating to the deceased estate should not be sued in his personal capacity. This case may be distinguished from the one at hand because in the latter, the appeal at District Court Lushoto was clearly marked Probate Appeal No. 02 of 2020 that originated from Probate and Administration Cause No. 29 of 2020, Dochi Primary Court. The case at Dochi Primary Court the appellant was marked administrator of the estate of the late Halfani Kasherente. Thus, the record of Probate and Administration No. 29 of 2020 at Dochi Primary Court is clear. It shows which party was appearing in the capacity of administrator of the estate of the late Halfani Kasherente.

In my view, even if the Respondent in the District Court Probate Appeal No 02/2020 was not named Alluy Kasherente "administrator of the estate of the late Halfani Kasherente" that cannot be said to be fatal as

the appeal is clearly marked arising from Probate Case No. 29 of 2020 before Dochi Primary Court. It is clear in the pleadings of that case that Alluy Kasherente is the administrator of the late Halfani Kasherente. The Respondent who is the Appellant in this High Court case was not sued in his personal capacity. Therefore, the District Court of Lushoto was properly moved and in the spirit of the overriding objective under Article 107A (2) (b) and (e) of the Constitution of the United Republic of Tanzania, [Cap 2 R.E. 2019]. The overriding objective has been discussed in the case of **Yakobo Magoiga Gichere v Peninah Yusuph, Civil Appeal No. 55 of 2017, Court of Appeal** Tanzania (unreported). The overriding objective ensures that technicalities do not vitiate substantive justice. Thus, in the present case it was proper for the District Court of Lushoto not to struck out the appeal.

The next question is what were the irregularities observed by the District Court? Improper admission of documents as exhibits. The record of proceedings the ruling on objection to appointment of administrator in the Primary Court show that there are documents in the trial Court file some are marked as exhibits others are not. Those marked e.g., the will is marked as "A" but it is not explained how then it was tendered, and admitted as exhibit. Besides that, another irregularity is how the trial Court dealt with the main case (application for appointment of

administrator) and the objection to the appointment of administrator of the estate of Halfani Kasherente. These were kept in separate documents which is contrary to the requirement of the law that in Primary Court both ought to be in the same document. It means the Application and objection were supposed to be determined simultaneously. The judgment should have contained determination of objection and Application as rightly observed by the District Court but the trial Court simply overruled the objection in one document, and later pronounced judgment which based on the ruling in another document. Indeed, the proceedings are silent on how the Application was heard. The witnesses ought to have been called upon to testify on the objection and Application. This is visible in the District Court of Lushoto judgment at pages 3-4. Similar position was held in **Ally Juma v Mwanaidi Juma, (supra)**. These are matters of law. They must be observed. In the case **Elizabeth Kintu v William Francis, PC. Civil Appeal No. 1 of 2020, High Court of Tanzania, Bukoba District Registry at Bukoba at page 4**, it was held that the procedures set out in the relevant laws regulating probate matters should be complied with. If the law is not complied with there will be complaints of irregularity and fraud.



Regarding irregularities in the Dochi Primary Court Proceedings and the judgment go to the root of the case, see the case of **Issa Hassan Uki vs the Republic, Criminal Appeal No. 129 of 2017, CAT at Mtwara and the case of Mohamed Said Matula vs Republic [1995] TLR 5** and such irregularity proceedings and judgment could not be left unattended by the 1<sup>st</sup> appellate Court. To correct them the Primary Court judgment and proceedings were rightly nullified by the District Court. This being a Court of record cannot leave such irregularities in court record as it was held in the case of **Diamond Trust Bank Tanzania Ltd v Idrisa Shehe Mohamed, Civil Appeal No. 262 of 2017 (unreported)**.

Thus, the second ground of appeal is dismissed because irregularities go to the root of the case (**Uki's case**). The trial Court pronounced ruling which based on exhibits whose admission is not stated in proceedings. Were those documents cleared for admission? Were they endorsed by the court? Were they read out loudly before the trial court? On perusal of the record of trial court proceedings, it is apparent they were neither cleared for admission nor endorsed by the trial Magistrate. Moreover, they were not read out loudly in the Court. It is trite law that admitting documents into exhibits without following proper procedure as laid down in the law is fatal because it may lead to miscarriage of justice. It was

held in the case of **Steven Salvatory v Republic, Criminal Appeal No. 275 of 2018, CAT at Mtwara (unreported)** at page 7 that for the document to be admitted in evidence, it must first be cleared for admission and after being admitted its contents be read out loudly in Court to enable the counterparty to appreciate its contents. Similar holding was given in the case of **Mohamed Juma @ Kodi v Republic, Criminal Appeal No.273 of 2018 Court of Appeal of Tanzania at Mtwara (unreported)**, the Court of Appeal of Tanzania held that failure to read out before the court exhibits is fatal.

The first ground of appeal lack merit because the District Court rightly examined the evidence on record and as 1<sup>st</sup> appellate Court is entitled to do so. It was in process of examining evidence on record that the District Court observed the fatal irregularities in the admission of exhibits. The District Court judgment on pages 3-7 focuses on evidence on record.

As for the second ground of appeal, we hold that the issue of irregularities being fatal or not depends on the circumstance of the case. If the irregularity leads to miscarriage of justice as is the case with the present appeal, and if such irregularity offends the law or if it is an irregularity that is apparent on the face of records, they are fatal. Therefore, the tendering documents and admitting the as exhibits are



matters of law. Their contravention goes to the root of the matter. In the trial Court record of proceedings, there are several documents marked as exhibits but it is not clear how they were tendered and admitted in evidence as exhibits. Again, the trial Court (Primary Court) failure to observe the law on how an objection as to appointment of administrator and the application of letters of administration these according to the law have to be dealt with in the same document. The Primary Court separated them, thus treated them in separate documents. That is fatal as it contravenes the law. For that reason, the third ground of appeal is without merit.

In totality this appeal lacks merit. It is dismissed. Considering that the parties were not represented by advocates, no order for costs is made. The case shall be heard afresh at the Dochi Primary Court before another magistrate as it was decided by the District Court of Lushoto.

**DATED** at **TANGA** this 6<sup>th</sup> Day of September 2021.

**U. J. AGATHO**  
**JUDGE**  
**06/09/2021**

**Date:** 06/09/2021

**Coram:** Hon. Agatho, J

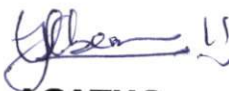
**Appellant:** Present

**Respondent:** Present

**B/C:** Zayumba

**Court:** Judgment delivered on this 6<sup>th</sup> day of September, 2021 in the presence of the Appellant, and the Respondent.



  
**U. J. AGATHO**  
**JUDGE**  
**06/09/2021**

**Court:** Right of Appeal fully explained.



  
**U. J. AGATHO**  
**JUDGE**  
**06/09/2021**