IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 180 OF 2020

(Appeal from the judgment of the District Court of Kinondoni at Kinondoni (Kazema, RM) in Probate Appeal No. 5 of 2019 dated 15th of July, 2020)

MUNGUATOSHA JOHN (Administrator of the estate of the late **ROSE METHUSELAH MSAKY) ..... APPELLANT**

VERSUS

PETER JOHN MGANGA ..... 1ST RESPONDENT

PATRICK JOHN MGANGA ..... 2ND RESPONDENT

JUDGMENT

24th February, & 25th March, 2022

ISMAIL, J.

The appellant in the instant appeal was appointed as an administrator of the estate of his late mother, Rose Methuselah Msaky. The appointment was done pursuant to the petition for letters of administration instituted as Probate and Administration Cause No. 34 of 2019. The trial court identified three beneficiaries of the estate and the respondents featured nowhere in that list of beneficiaries. This triggered a complaint by the respondents who took the view that their exclusion from the list of beneficiaries was

unjustified. Vide a ruling delivered on 14th February, 2020, the trial court dismissed the complaint and made the following specific orders:

1. *"Watoto halisi wa marehemu ndio wenye haki ya kurithi na hivyo kuhusika katika mgao wa mali za marehemu.*
2. *Watoto wanaoeleza kuwa walirithiwa na kulelewa na marehemu hawana haki ya kurithi na kugaiwa mali katika mirathi hii.*
3. *Watoto wanaoeleza kuwa walirithiwa na kulelewa na marehemu wanaaswa na kuonywa na mahakama ili kuachana kabisa kujihusisha na mali za marehemu, kwani kwa kuendelea kujihusisha watakuwa wanakwenda kinyume na sheria na hivyo hatua kali za kisheria zitachukuliwa dhidi yao."*

This decision did not go well with the respondents. Expressing their unhappiness, an appeal was instituted to the District Court (1st appellate court), against what the respondents considered to be an exclusionist move of disinheriting them from the deceased's estate. Their appeal to the 1st appellate court was not determined on merit. The 1st appellate court found that the conduct of the trial proceedings was shrouded in some anomalies, as the decision was arrived at without affording the appellant (then the respondent) the right to be heard. Such right was in respect of the allegations raised by the present respondents in the supplemental

proceedings held subsequent to appointment of the appellant as an administrator of the deceased's estate. The learned magistrate considered that to be a serious violation of the principles of natural justice. While putting the appeal process on a pose, he pulled off the court's revisional powers, under section 21 of the Magistrates' Court's Act, Cap. 11 R.E. 2019, quashed and set aside the proceedings, and decision of the trial court. He, instead, ordered trial *de novo* before a new set of the magistrate and assessors.

This decision has drawn the appellant's ire and the main complaint is that the 1st appellate court's unilateral decision did not consider the parties' right to address the court before the decision was arrived at.

The Petition of Appeal has raised four grounds of appeal, reproduced in verbatim as hereunder:

1. *That, the Honourable Magistrate erred in law and in fact by raising new matters in the judgment which were neither in dispute between the parties or (sic) among the grounds of appeal of Probate Appeal No. 5 of 2020.*
2. *That, the Honourable Magistrate erred in law and in fact by determining new matters she raised suo motto without giving parties right to be heard and address the Court on the new matters.*
3. *That, the Honourable Magistrate erred in law and in fact by failing and ignoring to determine the core of the dispute between the parties to Probate Appeal No. 5 of 2020 as to whether the*

respondents established to be the rightful heirs of the deceased estate (sic) or not.

4. *That, the Honourable Magistrate erred in law and in fact by making a decision on Probate Appeal No. 5 of 2020 contrary to principles governing the determination of appeals.*

The appeal was argued by way of written submissions, filed consistent with the filing schedule. Ms. Mariam Ismail, learned counsel whose services were enlisted by the appellant, threw the first jab. With respect to the 1st ground, the contention by Ms. Ismail is that it was wrong for the 1st appellate court to nullify trial proceedings where the wrong alleged to have been committed by the trial court did not have any prejudicial effect to the appellant. Learned counsel further argued, that failure to afford the appellant the right to be heard was not a ground of appeal. It was improper, in the appellant's view, for the 1st appellate court to treat that ground as a serious irregularity that would go to the root of the decision of the trial court.

Ms. Ismail also took a swipe at the 1st appellate court's holding that the proceedings of the clan meeting were of no significance to the trial proceedings while the same were admitted and considered by the trial court. She argued that such meetings are encouraged, as was held in ***Jonathan K. Ngomera v. Esther Julius***, HC-Probate Appeal No. 10 of 2020

(unreported). The appellant took the view that it was improper for the 1st appellate court to censure the trial court for adopting the said clan proceedings.

With regards to ground two, the appellant's argument is that the appellate court was erroneous in its decision to determine issues raised *suo motu* without affording the parties the right to be heard on the said issues. The appellant was of the view that the decision was a clear violation of the settled position of the law, as underscored in ***Charles Christopher Kombe v. Kinondoni Municipal Council***, CAT-Civil Appeal No. 81 of 2017 (unreported).

Submitting on ground three, Ms. Ismail took the view that powers of the court on appeal are exercised under the provisions of section 20 (1) (b) of Cap. 11, and that the exercise of such powers required that the 1st appellate court states the principles of the law governing determination of appeals. Such principles require that appeals be determined on their merit and not otherwise.

On ground four, the appellant's take is that the learned magistrate, sitting on appeal, was not empowered to venture or assume revisional proceedings midway through the appeal proceedings. Learned counsel for the appellant felt that section 21 (1) (c) of Cap. 11 cannot stretch further to

cover issues which are not related to the Court's appellate jurisdiction. It was the appellant's contention that the net effect of this flagrant violation is to apply the principle in ***Abdallah Hassan v. Juma Hamis Sekiboko***, CAT-Civil Appeal No. 22 of 2007 (unreported), in which a similar conduct by the Court was censured for being discrepant.

The appellant urged the Court to quash the lower court proceedings, set aside the decision, and restore the trial court's decision.

The respondents enjoyed the services of Mr. Irene Nambuo, learned counsel who was equally formidable in her rebuttal submission. She took the view that the court's vast powers on appeal include those of confirming, reversing, amending or varying the decision from which an appeal arises.

Ms. Nambuo contended that the trial court's decision failed to conform to the requirements of a good judgment, as provided for under Order XX rule 4 of the Civil Procedure Code, Cap. 33 R.E. 2019 (CPC). The respondents argued that the right to be heard was not part of the judgment of the trial court. This, in the respondents' view, meant that the trial court's decision was faulty.

Finding that there was nothing blemished in the trial court's decision, the respondents urged the Court to dismiss the appeal with costs.

The singular question arising from the parties' contention is whether the parties and, particularly the appellant, were denied the right to be heard.

As submitted by the appellant, the appeal to the 1st appellate court had four grounds of appeal. These grounds of appeal decried the trial court's failure to consider the testimony adduced by the respondents on their eligibility to be part of the family that is entitled to a slice in the deceased's estate. The parties' submission in that court dwelt on these decisional challenges that the respondents' were not happy about. Issues arising from the grounds of appeal and from the submissions were given a wide berth the moment the 1st appellant magistrate learnt of what he considered to be an error of law. The alleged error arises from the failure, by the trial magistrate, not to let the appellant (the petitioner then) to testify in rebuttal to what the respondents had submitted. In the appellant's view, that was a perversion of justice.

It is common knowledge that parties to a case enjoy the right of being heard on a matter that awaits determination of their rights. This right constitutes an obligation by judicial officers to ensure that every decision is preceded by the active engagement of the parties. It is a right accorded under Article 13 (3) (a) of the Constitution of the United Republic of Tanzania. Court decisions have also weighed in and cemented the position

enshrined by the law. These include Charles Christopher ***Humprey Kombe v. Kinondoni Municipal Council*** (supra).

In ***Kumbwandumi Ndemfoo Ndossi v. Mtei Bus Services Limited***, CAT-Civil Appeal No. 257 of 2018 (unreported), the Court of Appeal of Tanzania held as follows:

> *"Basically, cases must be decided on the issues or grounds on record and if it is desired by the court to raise other new issues either founded on the pleadings or arising from the evidence adduced by witnesses or arguments during the hearing of the appeal, those new issues should be placed on record and parties must be given an opportunity to be heard by the court."*

The foregoing position is a leaf picked from the upper Bench's reasoning in ***Abbas Sherally & Another vs Abdul S. H. M. Fazalboy,*** CAT-Civil Application No. 33 of 2002, in which the upper Bench made the following emphasis:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by the courts in numerous decisions.* ***That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard,***

because the violation is considered to be a breach of natural justice." [Emphasis added]

See also: ***Scan – Tan Tours Ltd v. The Registered Trustees of the Catholic Diocese of Mbulu***, CAT-Civil Appeal No. 78 of 2012 (unreported); ***Director of Public Prosecutions v. Shabani Donasian & 10 Others,*** CAT-Criminal Appeal No. 196 of 2017; ***Mire Artan Ismail & Another v. Sofia Njati***, CAT-Civil Appeal No. 75 of 2008 (all unreported); ***Shomary Abdallah v. Hussein and Another*** *(1991) TLR 135;* ***National Housing Corporation versus Tanzania Shoes and Others*** *(1995) TLR 251 and* ***Ndesamburo v. Attorney General*** *(1977) TLR 137.*

In the instant appeal, the issue that eventually settled the matter was raised *suo motu* as the 1st appellant court was composing the decision. Because of its pertinence, it decisively settled the matter. But, while the conclusion was unblemished, it is the manner in which the matter was handled that has raised a few eyebrows. It was simply a court affair that did not consider that the parties deserved to say a word or two on the regularity and decency of choice that he made. The fact is that the decision was unilateral, and the court indulged in what it pointed its finger at. The 1st appellate magistrate had a choice of summoning the parties, hear them out

and arrive at a conclusion, even if that conclusion favours what he had already made his mind on.

It follows, therefore, that the blatant disregard of this cardinal principle of natural justice had far reaching consequences, and I agree with the appellant that this is a decision on which the Court should not blink an eye.

Consequently, in view of the foregoing, I allow the appeal. I order that the proceedings of the 1st appellate court be quashed, the decision set aside, and the matter be remitted to the 1st appellate court for trial *de novo* of the appeal filed by the respondents. Hearing should be conducted by another magistrate.

Parties to bear own costs.

Rights of the parties have been duly explained.

Order accordingly.

DATED at **DAR ES SALAAM** this 25th of March, 2022.

M.K. ISMAIL

JUDGE