IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 243 OF 2021

(Arising from Ruling of the District Court of Kinondoni at Kinondoni in Probate Appeal No. 4 of2021, dated 31/05/2021, before Hon. L. Silayo, RM, Originating from Probate and Administration Cause No.252 of 2020, before Kawe Primary Court)

FLORA AUGUSTINE MMBANDO.....APPELANT

VERSUS

ABDUL DAUD CHANG'A..... RESPONDENT

JUDGMENT

Date of Last Order: 24.05.2022

Date of Judgment: 24.06.2022

E.E.KAKOLAKI, J.

In this appeal the appellant is challenging the decision of Kinondoni District Court in Probate Appeal No. 4 of 2021, which was entered in favour of the respondent. The background story giving rise to this appeal briefly goes as hereunder. The appellant and biological mother of Aisha Daudi Chang'a (deceased) was one of the wives of the late Daudi Ally Chang'a who died intestate on 09th December, 2007. His estate was administered by Mohamed Ally Chang'a who was dully appointed by Mwanjelwa Primary Court (Mbeya). In the course of distribution of the deceased's estate Aisha Daudi Chang'a, a minor and deceased now, and under guardianship of her mother (appellant) was given a house in Plot No.99 Block C located at Boko area

within Dar es salaam Region. The said Aisha could not live to attain the age of majority so to take charge of her inheritance (house) as she died on 19th January, 2013 at the age of 13 years old only. Following her death the appellant (biological mother) successfully petitioned and appointed as administratrix of her estate at Kawe Primary Court in Administration Cause No.252 of 2020.

The respondent herein who is also the half-brother to the late Aisha, was not pleased with the appellant's appointment and distribution of the house to the late Aisha under guardianship of the appellant, hence unsuccessfully challenged it before same Kawe Primary Court. It was his grounds there that, **one**, the Probate Cause before Mwanjelwa Primary Court concerning their late father's estate was never closed, thus the house in dispute in Plot No.99 Block C located at Boko area within Dar es salaam Region, was never distributed to the late Aisha, for the appellant to administer as it was his. **Secondly** that, the blood related relatives were never involved in the family meeting that allegedly endorsed the appellant to petition for probate. The appellant who denied the allegations levelled against her charged that, she was in control of Aisha's estate after being appointed as administratrix of her estate. On the distribution of house of Boko to the late Aisha as part of the

estate of her late father Daudi Ally Chang'a she contended, the dispute reached the High Court of Tanzania, Mbeya Registry and the Mwanjelwa Primary Court decision confirmed that the said house be distributed to the late Aisha. The trial court having heard both sides on 31/12/2020 ruled that, the objection by the respondent was without merit and proceeded to dismiss it, while directing him to appeal against appellant's appointment as administratrix of the estate of the late Aisha if he so wished. It is from that decision the respondent successfully appealed to the District Court of Kinondoni vide Probate Appeal No. 4 of 2021, as the entire trial court proceedings were quashed and the decision for appointment as administratrix of Aisha's estate set aside, while ordering trial de novo of the petition before another competent magistrate. In so doing the appellate court relied on two grounds. One, the family meeting was improperly procured for not involving parties from the late Aisha's father and secondly that, as the family meeting minutes were invalid hence the respondent was denied of his right to be heard for not being availed a chance to address that impropriety or otherwise of the family meeting minutes. Discontented with the decision, the appellant is now before this Court armed with four grounds of appeal going thus:

1. That, the learned Magistrate erred in law and in fact by holding that the Respondent was denied a right to be heard before Kawe Primary Court while the general citation was done as per the law and the whole public ought to have actual notice that the Appellant had applied for letters of administration.
2. That,the learned Magistrate erred in law and in fact by holding that the family meeting and the minutes extracted thereof was invalid.
3. That,the learned Magistrate erred in law and in fact by holding that the meeting which appointed the Appellant to petition for letters of administration was not properly constituted as it did not involve blood related relatives of the deceased particularly on the father's side while the court's record shows otherwise.
4. That,the learned Magistrate erred in law and in fact for failure to properly evaluate the evidence adduced before the Primary Court and arguments put before her hence reached into unreasonable decision.

On the strength of the above grounds the appellant prays this court to allow the appeal by setting aside the revocation order and restore the granted letters of administration to her.

By consensus hearing proceeded by way of written submissions as the appellant enjoyed the service of Mr. Mwang'eza Mapembe, learned advocate whilst the respondent defended by Mr. Steward Ngwale, learned advocate. Both parties complied with the filing schedule orders.

In his submission the appellant's counsel opted to combine the 2nd and 3rd grounds of appeal while arguing separately the 1st and 4th grounds. In this judgment, I am prepared to follow the same stream when determining the said grounds of appeal. To start with the first ground, Mr. Mapembe faulted the appellate court on its findings that, the respondent was denied of his right to be heard before the Kawe Primary Court, on the ground that, he did not attend the family meeting nor given chance to address such impropriety during hearing of the petition for grant of letters of administration. He argued that, the law under rule 3 and 5(4) of the Primary Courts (Administration of Estates) Rules GN.49 of 1971 (the Rules), requires a person who applies to be appointed as administrator of the estates to **firstly**, fill Form No.1, **secondly,** to issue notice in an appropriate form (citation) to the general public and **thirdly**, court to proceed with hearing of the petition after satisfying itself of the issue of notice to the public. He said, all the procedures were followed as Form No.1 was filled and filed in court, general

citation made to the interested persons and general public by way of publication in Uhuru Newspaper, that the appellant petitioned for letters of administration in respect of the estate of the late Aisha Daudi Chang'a. That, it was from that citation and the unchallenged petition, the Kawe Primary Court proceeded to appoint the appellant as administritrix of the estate of the late Aisha. That aside, he added, after appellant's appointment the respondent initiated the complaint before the trial court seeking to revoke her appointment, which was heard and finally dismissed for want of merit. In view of the foregoing the learned counsel submitted that, the learned Magistrate erred in law and fact to hold that, the Respondent was denied his right to be heard, as the argument that the Uhuru newspaper is not one of the widely circulated newspapers capable of communicating the citation to the respondent, is unfounded as the same is a reputable one and widely circulated. Hence this ground has merit and should be allowed.

Responding to appellant's submission, Mr. Ngwale for the Respondent geared his submission by submitting that, the law under rule 5(4) of GN.49 of 1971, requires advertisement of notice of hearing to be made through locally used means of public announcements or by way of publication in a newspaper with substantial local circulation. According to him the appellant

failed to comply with such law as Uhuru Newspaper used to publish the citation is not a standard one and not widely circulated in Mbeya where he resides unlike Mwananchi newspaper which is common. To cement his stance that Uhuru is not widely circulated newspaper he cited to the Court the cases of **Julius Peter Nkonya Vs. Edgepoint Company Limited**, Misc. Land Case Application 45 of 2022 [2022] TZHCLandD 167 (22 March 2022) at page 4 of the judgment and **Monica Nyamakare Jigamba vs.Mugeta Bwire Bhakome & Another**, Civil Application 199 of 2019 [2020] TZCA 1820 (16 October 2020) at page 2 of the judgment. He thus called upon this court to find the law was not complied with and dismiss the ground. In his rejoinder submission Mr. Mapembe argued that, the cases cited by the respondent herein to support the submission that Uhuru newspaper is not widely circulated in essence do not provide for such authority. Otherwise he maintained his earlier position and prayer.

Having perused the trial court's record and keenly read the impugned decision of the appellant court, I am in agreement with Mr. Mapembe that, the appellant court was in error to adjudge that the respondent was denied of his right to be heard. I so find while fully aware that party's right to be heard before the adverse decision is made against him is so basic and

everyone is entitled to it particularly where he is the party to the suit, failure of which renders the entire proceedings a nullity for breach of the natural justice. See the cases of **Abbas Sherally and Another Vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 133 of 2002 (CAT-unreported), **Mbeya-Rukwa Auto Parts and Transport Vs. Jestina Mwakyoma** [2003] TLR 251 and **M/S Flycather Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG**, Civil Appeal No. 142 of 2017 (CAT-unreported). What is deciphered from the record in this matter is that, the procedures for appointment of the appellant as administratrix of the estate of the late Aisha were followed to the letters and in compliance with the provisions of Rules 3 and 5(2) of the Rules as also rightly submitted by Mr. Mapembe. After filing in Form No. 1, citation was made in the Uhuru newspaper on 27/10/2020 to make sure that all interested parties are notified in including the respondent himself. Once citation is properly done the presumption is that all interested parties and the public at general are notified fully and therefore become aware of the existence of the petition before the Court. As if that was not enough, the court availed itself with more than one month after citation to see whether there was any caveat/objection in respect of the filed petition before it

proceeded to grant the letters to the applicant on 01/12/2020. Further to that, on 31/12/2020 the respondent who had challenged the appellant's appointment was accorded with the right to be heard before his complaints were dismissed, hence appeal to the appellate court. With all that evidence in the basket, it cannot be soundly claimed that, the respondent was denied of his right to be heard. As regard to the contention that, Uhuru newspaper is not widely circulated, despite of failure to prove the assertion, I discount it for only one good reason that, that issue was never raised and determined either before the trial court or the appellate court, thus cannot feature, be discussed and decided on at this stage. I therefore find the first ground to be meritorious.

Next for consideration are the 2nd and 3rd grounds in which the appellate court is accused by the appellant to have erred when found that, the family meeting was improperly procured. Mr. Mapembe argued that, the meeting was rightly and properly conducted for being attended by members from both sides of deceased's mother and father as exhibited by the minutes before the trial court. He said, the respondent failed to satisfy the trial court that, the minutes were fraudulently procured and in compliance with the standard of proof of forgery as set in the case of **Ratilal Gordhanbhai**

Patel Vs. Lalji Makanji [1957] E.A 314, that allegations of fraud must be strictly proved. He added, since the submission of minutes of family meeting has become good practice in probate and administration matter as stated in the case of **Beatrice Brighton Kamanga and Another Vs. Ziada William Kamanga**, Civil Revision No. 13 of 2020, (HC-unreprted), the appellant found it proper to comply with it fully during the institution of the petition. Thus to him it was wrong for the appellate court to hold, the meeting was improperly procured despite of clear evidence that the same was genuinely procured on 11/07/2020, as the late Aisha's paternal uncle (Mussa Changá) and aunt (Amina Msofe) were also in attendance. In view of the above, he invited this court to find merit in the two grounds.

In rebuttal submissions Mr. Ngwale resisted the submission by Mr. Mapembe. He said the essence of conducting family meeting including members from both sides is to make aware every family member of what is going on regarding the appointment and administration of deceased's estate. In this case he lamented, the conducted family meeting purposely excluded large part of blood relatives from the side of Aisha's father including the respondent who stepped into shoes of administrator of their late father after being appointed on 23/03/2021. On the importance of the family meeting

minutes in the probate cause he relied to the cases of **Beatrice Kamanga's case** (supra) and also the case of **Elias Madata Lameck Vs. Joseph Makoye Lameck** (PC Probate and Administration Appeal 1 of 2019[2020]TZHC 654. He further argued, to exhibit the intention of excluding the respondent from the process, even the citation was made into Uhuru newspaper not widely circulated in Mbeya where the respondent resides. Mr. Mapembe in his rejoinder submission said the appellant was not duty bound to inform the respondent though phones as a necessary member to the family, as his appointment as administrator of the estate of the late Daud Ally Chang'a came in late on 23/03/2021 and after the appointment of the appellant on 01/12/2020. So the respondent's submission are not worth of consideration by this court. In rejoinder Mr. Mapembe was insistent that, the claims by the respondent are not justified as the family meeting was attended by relatives from both sides. He added since the appellant is the deceased mother in essence was entitled to administer her estate and therefore lawfully appointed by the Court. He prayed the Court to dismiss the grounds.

It is true as submitted by Mr. Ngwale for the respondent that the essence of conducting family/clan meeting for submission in court when petitioning for

administration is to let the clan/family members be aware of what is going on concerning the administration of deceased estate or in other words acts as notice to family members, and I would add reduces conflicts and unnecessary objections before the Court during hearing of the petition as there will be consensus on who should be appointed to administer the estate. However, as rightly stated by this Court in the cases of **Beatrice Kamanga's case** (supra) and **Elias Madata Lameck** (supra), submission of family/clan meeting in court in probate and administration causes it not a mandatory requirement of the law but a good and cherished practice. Therefore non conduction or absence of the said meeting does not invalidate trial court proceedings or be the reason for revocation of the party's appointment to administer the estate as it was held by this Court in the cases of **Obeth Wange Vs. Anyagenye Mwasubila**, Dc Probate Appeal No.1 of 2007 and **James Peter Midelo Vs. Asia Ngoto Mzee and another**, Civil Appeal No. 223 of 2018 (both HC-unreported), the decisions which I subscribe to. In the case of **Obeth Wange** (supra) this Court had this to say:

> *"A clan however powerful cannot appoint an administrator. It merely nominates the candidate. Actually, the clan meeting*

aimed at nominating a suitable candidate for administration of the deceased estates is a matter of practice. The clan is under no legal obligation to do so."

Similarly in the case of **James Peter Midelo** (supra) this Court held that:

"As regards the submission of the forged minutes of clan meeting, it will not waste my time because minutes of clan meeting are not a requirement of law. It is a settled law that powers to appoint an administrator of the deceased's estate is vested into the court before which an application is lodged and not the clan meeting."

In this case, there is no dispute that, family meeting was conducted as exhibited by the minutes of 11/07/2020, in which the late Aisha's paternal uncle (Mussa Changá) and aunt (Amina Msofe) were also in attendance. What is being complained of by the respondent is that, the number of blood relatives from Aisha's father side were few as most of them did not attend the meeting including himself, who was also the replace of the administrator of the late Daudi Ally Chang'a's estate. With due respect I don't find merit in this complaint. I know no law that governs the conduction of the said clan/family meeting and the respondent did not mention any leave alone the fact that its minutes is not a mandatory requirement for institution of the petition for letters of administration. Absence of the respondent in the said

meeting held on 11/07/2020, who was by then not even appointed as administrator of the estate the late Daudi Ally Chang'a, under any stretch of imagination could not have invalidated the meeting as there is no specific number of members required to be in attendance to validate the meeting, apart from close relatives and beneficiaries to the deceased. Since the appellant and the only beneficiary to the deceased estate as biological mother was in attendance, I opine absence of the respondent in that meeting did not invalidate it. Thus the learned magistrate in the appellate court, I hold was in error to find the meeting was invalid, hence the two grounds have merit too.

Lastly is on the fourth ground where Mr. Mapembe contended that, the first appellate court erred in law and in fact for failure to properly evaluate and analyse the evidence adduced before Kawe Primary Court hence reached to unreasonable decision. It was his submission that, had the appellate court properly analysed the evidence above discussed and referred itself to all documents tendered, could have found the appellant was properly appointed after the transparent process duly supervised by the trial court and in compliance with all the procedures required by the law for appointment of the administrator. To him therefore the appellant's appointment was wrongly

revoked. He thus invited this court to examine the record before it and interfere with the findings of the appellate Court as there was misapprehension of evidence which occasioned injustice to the appellant. On his side Mr. Ngwale said, the appellate court properly analysed the evidence and rightly came up with the reasonable just judgment. Therefore to him, it was justifiable for the appellate court to order trial de novo, hence this appeal be dismissed. In his rejoinder submission on this ground Mr. Mapembe's almost reiterated his submission in chief and the prayers thereto.

Having considered both parties' submission in this ground the issue for determination is whether the appellate court properly evaluated the evidence before it and arrived to the right conclusion. I think this ground need not detain me much. The decision of the appellate court is premised on the propriety and validity of the family meeting and the respondent's right to be heard on the procedure adopted to appoint the appellant as administrator of the estate of the late Aisha's estate. Had he considered the evidence on how the petition was preferred by filling in Form No. 1 and how the citation was properly made and the fact that there was minutes of family meeting properly conducted as well as the fact that the respondent was heard on his complaint when challenging the appellant's appointment, as found when

determining the 1st ,2nd and 3rd grounds of appeal, I am plenty sure that, she would not have arrived to the conclusion she reached of quashing the proceedings and set aside the trial court's decision. In view of the above, I am in agreement with Mr. Mapembe that, the appellate court misapprehended the evidence which act caused injustice on the appellant's side. This ground has merit too.

That said and done, I allow this appeal by setting aside the decision of the appellate Court and restore the decision of Kawe Primary Court that appointed the appellant as administratrix of the estate of the late Aisha.

I make no orders as to costs.

It is so ordered.

Dated at Dar es salaam this 24th day of June 2022.

E. E. KAKOLAKI

JUDGE

24/06/2022.

The Judgment has been delivered at Dar es Salaam today on 24th day of June, 2022 in the presence of Mr. Mwang'enza Mapembe, advocate for the Appellant and Ms. Asha Livanga, Court clerk and in the absence of the Respondent.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
24/06/2022