IN THE HIGH COURT OF TANZANIA

DAR ES SALAAM SUB DISTRICT REGISTRY

AT DAR ES SALAAM

CIVIL APPEAL NO. 66 OF 2022

(Arising from Judgment of the District Court of Kibaha in Probate Appeal No. 07 of 2021, before Hon. F. Kibona, RM dated 29/04/2022, Original Primary Court of Mlandizi in Mirathi Na.50/2021,)

ASHA MOHAMED.....APPELLANT

VERSUS

ANTHONY ULIRK MASAWE..... RESPONDENT

JUDGMENT

Date of last Order: 24/08/2022

Date of judgment: 23/09/2022

E.E. KAKOLAKI, J

The appellant herein being aggrieved with the decision of the District Court of Kibaha in Probate Appeal No. 07 of 2021, delivered on 29th April,2022, has preferred this appeal equipped with one ground of appeal going thus:

1. The learned Magistrate grossly erred in law and in facts for holding that the appellant has no *locus standi* to file appeal in the District Court.

Before going further, I find it imperative to narrate albeit so briefly the facts giving rise to this appeal as gleaned from the records of appeal. Following

death of Condrad Ulirk Masawe (the respondent's brother) his clan/family meeting appointed the respondent to apply for letter of administration of the deceased estates. The respondent honoured the blessings of clan/family meeting by petitioning successfully the Primary Court of Mlandizi in Mirathi No. 50 of 2021 for grant of the letters of administration. Aggrieved and believing she has a right to appeal against the respondent's appointment, the appellant filed the appeal in the District Court of Kibaha vide Civil Appeal No. 7 of 2021, basing on six (6) grounds which for the purposes of this appeal, I find it irrelevant to register them.

Upon full hearing of the appeal the first appellate court dismissed the appeal on the ground which was raised suo motu discussed and decided on that, the appellant is not a party to the suit hence has no right to appeal in that matter. Irked with the decision the appellant is before this court to express his dissatisfaction on the one ground of complaint that, the appellate court magistrate grossly erred in law and facts to hold that, the appellant has no locus standi to file an appeal in the district court.

When the appeal called for hearing both the appellant and respondent appeared represented by Mr. Ludovick Nickson and Tumaini Mgonja, learned advocates, respectively and were both heard viva voce.

Submitting in support of the appeal Mr. Nickson submitted that the appellate court magistrate in his judgment suo motu raised the issue of locus stand and based his decision on it without according both parties with the right to be heard the act which breached the appellant's fundamental right of being heard before adverse decision is entered against her. That omission renders the decision reached a nullity. To support his stance he cited the case of **Tabu Ramadhani Mataka Vs. Fauziya Haruni Saidi Mgaya,**Civil Appeal No.456 of 2020 (CAT-unreported) where the Court stated that, the omission to accord the parties with an opportunity to argue and address the court on the issue raised suo motu is a gross violation of the right to be heard which is one of the principles of natural justice.

On the strength of his submission, he prays the appeal be allowed and the judgment entered by the appellate court be set aside and order for rehearing of the appeal be entered.

On the respondent's side Mr. Mgonja commenced his submission by distinguishing the cited case of **Tabu Ramadhani Mattaka** (supra) with the facts in the present matter. He said, in the cited case the appellant was a proper party in the case when denied of the right to be heard on the issue raised suo motu by the court unlike in this case where the appellant was not

a party to the case since its trial, hence at any rate the court could have accorded her with an opportunity to be heard. To bolster his argument he cited the case of **Yahaya Jawewa and 4 Others Vs. Said Masudi**, Civil Revision No.44 of 2008 (HC-unreported), where this Court held that, a third party cannot appeal to the matter which is not a party. Further to that, he cited another case of **Monica Nyamakare Jigamba Vs. Mugeta Bwire Bhakome as administrator of the estate of Musiba Reni Jigabha and another**, Civil Application No.199/01 of 2019 (CAT-unreported). Basing on the cited decisions he prayed the court to dismiss the appeal.

In his rejoinder Mr. Nickson submitted that in his view the case cited by the respondent are irrelevant and do not go the root of the matter at dispute and that counsel for the respondent failed to respond to the issue at contest that decision was made on suo motu raised issue without according parties with the right of hearing. On the contention by Mr. Mgonja that since the appellant was not a party to proceedings before the trial court hence had no right to be heard, he responded that since the appellant was already before the court it was proper for the appellate court magistrate to accord her a right to be heard on the suo motu raised issue before its determination. Hence urged the court to allow the appeal as the cited cases by Mr. Mgonja

were not addressing the issue at dispute whether a decision can be made without according parties with the right to be heard but rather whether a non-party to the case has a right to appeal which is not the case in this appeal.

Having heard the parties' submissions and having serenely examined the trial court records, it is undisputed that the appellant in this appeal was not a party to the suit before Mlandizi Primary Court in Mirathi No.50 of 2021. It is also uncontroverted fact as gathered from the first appellate court's judgment that, the issue as to whether the appellant had a right to appeal before the appellate court for not being party to the suit in the lower court was raised and decided on by the court suo motu, without affording parties with an opportunity to address it on that issue. It is Mr. Ludovick's argument that, that omission is tantamount to denial of the parties' right to be heard, which is the natural justice. It is true and I agree with Mr. Ludovick that the right to be heard is so fundamental as any decision reached in its breach or violation infracts the principles of natural justice. As what should be done by the judge/magistrate in the event a new issue crops up in the due course of composing a judgment, the settled law is that, such new question or issue must be placed on record and parties be given an opportunity to address the

court on it. See the cases **Said Mohamed Said Vs. Muhusin Amir & Another** (Civil Appeal No. 110 of 2020)[2022]TZCA 208(25 April 2022); www.tanzlii.org and the case of **Tabu Ramadhani Mattaka** (supra) which quoted with approval the case of **National Insurance Corporation (T) Ltd Vs. Shengena Limited**, Civil Application No.230 of 2015 (unreported) where the court reiterated what it had earlier on stated in **I.P.T.L Vs. Standard Chartered Bank,** Civil Revision No.1 of 2009 (unreported) where it was held that:

> *"No decision must be made by any court of justice /body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice."*

In this matter as alluded to above, the appellate court magistrate suo motu raised the issue as to whether the appellant was a competent party to appeal before that court and proceeded to find against her by dismissing the appeal, without affording both parties with an opportunity to address it on the same. I disagree with Mr. Mgonja on his proposition that, it was proper for the appellate court to dismiss the appellant's appeal on the ground that, she was not a party to the suit before the trial court, hence had not right to appeal.

The reason I am so differing with him in not far-fetched as since she purportedly filed the appeal before the appellate court and heard on six grounds of appeal she had raised, was presumed to be properly before the Court until otherwise proved. And if the Court felt that, the issue as to whether the appellant had a locus stand to appeal against the respondent or not was so pertinent to be disposed of before consideration of other grounds of appeal, the only alternative he had was to put in abeyance the judgment composing exercise and summon the parties to address him on that issue before any adverse decision could be entered against either of the parties, the duty which he failed to do. Thus, I hold he was in clear violation of the principle natural justice of the right to be heard. Now what is the consequences of such omission to accord parties with the right to be heard?

It is trite law that, where any decision is entered in breach or violation of the principle of natural justice on the right to be heard, its effect is to render the proceedings and judgment or ruling if any a nullity regardless of the fact the same decision would have been reached had the party been heard. That was the Court of Appeal stance in the case of **Abbas Sherally and Another Vs. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 133 of 2002

(CAT-unreported) where Mroso, JA (as he then was) on the effect of violation of the right to be heard had this to say:

> *"The right of a party to be heard before adverse action or decision is taken against such a 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 would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice****." (Emphasis added).*

Similar views were aired by the same Court in the case of **M/S Flycather Safaris Limited Vs. Hon. Minister for Land and Human Settlement Development and AG**, Civil Appeal No. 142 of 2017 (CAT-unreported), where it was observed thus:

> ***"Failure to accord the parties the right to be heard*** *on the propriety of the power of attorney in question* ***denied the parties the right to be heard on the issue*** *and we are satisfied this* ***anomaly is fatal and vitiated the proceedings and Ruling****. See,* ***Dishon John Mtaita Vs. DPP****, Criminal Appeal No. 132 of 2004 and* ***Scan Tan Tours Ltd Vs. The Registered Trustees of the Catholic Diocese***

***of Mbulu**, Civil Appeal No. 78 of 2012 (all CAT-unreported)" (Emphasis added)*

Guided by the above authorities on the effect of decision arrived at without affording parties with the right to be heard, in this matter I find that since the appellant magistrate raised the issue of locus stand of the appellant and proceeded to decide on it without according parties with the right to address him first on it, I hold the said judgment of the District Court of Kibaha handed down on 29th April, 2022, is rendered a nullity. I thus allow the appeal and proceed to quash and set it aside. I further order the record to be remitted to the District Court of Kibaha for the parties to be heard on the raised issue by the Court suo motu if need be and thereafter a fresh judgment to be composed in accordance with the law before another competent magistrate. I make no order as to costs.

It is so ordered.

Dated at Dar es salaam this 23rd day of September,2022.

E. E. KAKOLAKI

JUDGE

23/09/2022.

The Judgment has been delivered at Dar es Salaam today 23rd day of September, 2022 in the presence of Mr. Ludovick Nickson for the appellant, Mr. Tumaini Mgonja, advocate for the respondent and Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
23/09/2022.