

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
IN THE DISTRICT REGISTRY OF ARUSHA  
AT ARUSHA**

**CIVIL APPEAL NO. 6 OF 2020**

*(Originating from Civil Revision No 10 of 2018 in the District Court of Arusha at Arusha, Original Probate Cause No. 186 of 2013 before Arusha Urban Primary Court)*

**ELIZABETH AMOUR MOSHA ..... APPELLANT**

**VERSUS**

**MAIMUNA SULEIMAN MUNISI ..... RESPONDENT**

**JUDGMENT**

09/03/2022 & 25/04/2022

**KAMUZORA, J.**

This appeal is against revisional order of the District Court of Arusha at Arusha in Revision No. 10 of 2018 which revised the proceedings of the Arusha Urban Primary Court in Probate Cause No. 186 of 2013. The Appellant in this appeal one Elizabeth Amour Mosha stood as the Respondent before the District Court while the Respondent in this appeal Maimuna Suleiman Munisi stood as the applicant.

The brief background of the matter albeit is that, the Appellant Elizabeth Amour Mosha applied and was appointed administrator of the estate of the deceased Amour John Mosha in the year 2013 by Arusha

Urban Primary Court in Probate Cause No. 186 of 2013. The records show that decision appointing the Appellant as administratrix of the estate of the deceased was issued on 17<sup>th</sup> September 2013.

On 2<sup>nd</sup> January, 2018, the Appellant applied before the primary court to file the inventory and account for the administration of the estate and on 3<sup>rd</sup> January 2018 the probate matter was marked closed. On 04<sup>th</sup> May 2018 the Respondent wrote a letter to the district court which was received on 8<sup>th</sup> May 2018 complaining on the conduct of the objection which she initiated before the trial court. The district court through that letter opened the revisional proceedings and proceeded on quashing the proceedings of the primary court dated 2<sup>nd</sup> January 2018 and 3<sup>rd</sup> January 2018 and set aside the order made therefrom. The district court further ordered the trial court to hear the Respondent's evidence in the objection that was initiated by the Respondent herein before the primary court. It is in record that, after the revisional order of the district court the file was remitted to the Primary court for compliance.

The Primary court after hearing the parties issued a ruling dated 07/03/2019 which revoking the appointment of the applicant and appointed Gaston John Mosha to administer the deceased estate. That decision was challenged before the district court in Civil Appeal No. 15 of

2019. It is claimed that the decision of the district court in that appeal is also challenged although the petition of appeal is still at the district court of Arusha pending the dispatchment of the record to the High court.

Before this court the Appellant is challenging the revisional order of the district court in Revision No. 10 0of 2018 on the following grounds: -

1. *That the district court erred in law and in fact in denying the Appellant right to be heard.*
2. *That, the district court erred in law and in fact in entertaining the Respondent claim while its hand was *functus officio* to entertain the claim.*
3. *That the district court erred in law, procedure and in fact in making revisional order dated 11<sup>th</sup> day of July in total disregard of the decision of the **Court of Appeal in the case of Ahmed Mohamed Al Laamar Vs Fatuma Bakari and Asha Bakari, Civil Appeal No. 71 of 2012** at Tanga (unreported).*
4. *That the district court erred in law and procedures in invoking the revisional order to the probate which has already been closed.*
5. *That, the district court erred in law, procedures and in fact in entertaining the Respondent claims without summoning the Appellant whose address for service was available in the file.*

It is unfortunate that this court was unable to get the records of the Primary court and the Deputy Registrar in charge of Registry confirmed by affidavits that the records are still missing. To avoid delay in disposing this appeal, parties were requested to submit necessary documents

related to this case before the primary court. Upon receiving necessary documents to assist this court in its determination, the appeal was set for hearing. On the date scheduled for hearing, both parties appeared and as a matter of legal representation, Mr. Gwakisa Sambo learned counsel represented the Appellant while Mr. Lengai Merinyo represented the Respondent.

Arguing in support of the 1<sup>st</sup> and 5<sup>th</sup> grounds of appeal, Mr. Gwakisa Sambo submitted that the Appellant is faulting the revisional order of the district court issued suo motu without giving the Appellant right to be heard. Although Mr. Gwakisa understands that the court has powers to make revision suo motu he insisted that in doing so, the court has to accord parties the right to be heard. He submitted that in this matter, the magistrate received a letter and proceeded on issuing an order of revision suo motu without according the Appellant a right to be heard. That, since the Appellant was not given right to be heard, the revision order is nullity. He supported his argument with the decision of the CAT in the case on **Pili Ernest vs Moshi Musani, Civil Appeal No. 39 of 2019, at Mwanza** and two decisions of the High Court in the case of **Fortunatus Nyigana Vs. Iddy Ally and 2 others, Land Appeal No. 2 of 2021 HC Land Division at DSM Pg 7** and the case of **Godwing Lengina**

**Masanga Vs Onesmo Lengina, PC civil Appeal No 18 of 2016, HC at Arusha pg4.** He added that the circumstances in the case of Godwin Lengina are similar to the circumstances in this case as the court pointed out that section 22 (1) of the MCA Cap 11 RE 2002 gives powers to the district court to revise the proceedings of the primary court but insisted that in doing so, the district court has to give parties a right to be heard.

Mr. Gwakisa further submitted that in the present appeal, while the magistrate in revision No 10 of 2018 did not give a right to be heard to the Appellant, in a very remote sense, you can say that the Respondent was heard because he was the one who lodged the complaint letter and from that letter the magistrate moved himself to revise the proceedings. Mr. Gwakisa was of the view that the revision order cannot stand as it denied the Appellant the right to be heard. That, even if the magistrate had the same conclusion he had reached, he was supposed to first hear the parties before giving that decision.

On the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal Mr Gwakisa submitted that the court erred in issuing the revision order while Probate No. 186 of 2013 was already closed. Referring the Court of appeal decision in the case of **Ahmed Mohamed Al Laamar Vs. Fatuma Bakari and another**, Mr Gwakisa submitted that when the probate matter is closed, the court

becomes *functus officio* to entertain that probate. He explained that, in the appeal before this court the district court was *functus officio* to proceed on issuing orders for other matters to be entertained in the same probate matter before the primary court because the said probate matter was already closed on 18/01/2018 and no order to reopen the same was issued. He noted that in the ruling closing the probate matter there was typing error of the date as the same shows that it was issued on 03/01/2018 while the same was closed on 18/01/2018 when the Appellant filed the inventory. Mr Gwakisa pray for this court to quash and set aside the revisional order of the district court of Arusha in Civil Revision No. 10 of 2018 and order for costs.

Responding on the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> ground Mr. Lengai Merinyo submitted that there is no proper order that was issued to close the probate matter. That, the order claimed to have closed the probate matter is not a correct order under the law. That, the said order was signed by Hon. Lyamuya on 03/01/2018 after the administratrix addressed the court but Form No. V and VI were not filed on that date but filed on 18/01/2018 meaning that Form no V and VI were filed after the court had closed the probate matter. Mr. Lengai added that in the wording of the trial court at page 2 the word "Msimamizi wa mirathi hii ajaze fomu namba sita" used

means that the magistrate while hearing the parties on that date, there was no Form No. V and VI and on that date the court directed the same to be filled. Mr. Lengai was of the view that the court distributed and closed the probate matter and not the administrator of the estate and that, after distribution and closing the file, the court ordered for Form No V and VI to be filled and the same were filed on 18/01/2018. To him on that date there was no case because the probate matter was already closed on 03/01/2018.

To buttress his submission Mr. Lengai referred the decision of this court in **Ibrahim Kusaga Vs Immanuel Mweta TLR (1986) 26** specifically page 30 of the decision. He pointed out that in that case the court discussed the powers of the Primary court in probate matters and insisted that the primary court had no powers to distribute the properties of the deceased as only the administrator had such powers. For the present matter he reiterated that, as the court issued the order to distribute and close the file while no Form No. V and VI were filed, the court interfered with the duty of the administrator.

Referring the case of **Ahmed Mohamed Al Laamar**, the counsel submitted that after the closure of the probate matter nothing is supposed to proceed. That, if the probate matter was closed on 03<sup>rd</sup>, the inventory

could not be filed on 18<sup>th</sup> while the matter is already closed. He thus prayed for this court find that the probate matter was not properly closed and that the decision of the DC in the revision proceedings which quashed the proceedings of the primary court was proper.

On the argument that there was error in the closing date of the probate matter the counsel for the Respondent submitted that, there is no proceedings for 18<sup>th</sup> as alleged. The counsel consented to the fact that the magistrate did not hear the Appellant, but insisted that the magistrate stated clearly that he passed through the proceedings of the primary court and discovered what he stated in his ruling at page 2 and 3 of the revisional order. That, in the ruling of the district court nothing concerning 18/01/2018 was addressed except for the proceedings for 03/01/2018. The counsel thus prays for this court to invoke its powers to return the records of the primary court for the same to start where it ended before 2<sup>nd</sup> and 3<sup>rd</sup> January 2018.

On the 1<sup>st</sup> and 5<sup>th</sup> grounds the counsel for the Respondent submitted that, although the proceedings of the district court does not show that the Appellant was heard this court be pleased to agree with part of the decision of the district court in Civil Revision No. 10 to which it was ordered that the case be returned to the Primary Court so that both parties



could be heard on where the matter ended. He prayed for same order referring the decision of this court in the case of **Edward Lenjashi Vs Nasi Muruo, PC Civil Appeal No. 49 of 2019 (unreported)** pg. 11-14 where the court applied section 44 (1)(b) of the MCA to order the file to be returned to the primary court to proceed to where the proceedings ended before the death of the Appellant. On the claim for costs, he prayed for this court to consider that the beneficiaries to this probate matter are relatives as the Respondent's child is also the child of the deceased to this probate matter and hence the costs be waived.

In rejoinder submission Mr. Gwakisa added that the counsel for the Respondent conceded that the Appellant was not given a right to be heard. That, as the right to be heard is fundamental, the revisional order cannot stand even partly as prayed for by the counsel for the Respondent. He contended that the case of **Edward Lenjashi** is distinguishable in the present circumstances because, in that case someone pretended to represent another person who was the deceased without proper procedure for representation thus, the court was justified to revise and to order the matter to be tried again. That, unlike in the present case, the Appellant is faulting the incorrect revisional order which is to be nullified for the court to issue proper decision. That this court cannot allow the

probate cause to proceed from 3<sup>rd</sup> while there is pending nullity revisional proceedings. He therefore prays for the revisional order to be set aside and the party be heard before the district court.

On the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> ground the counsel added that the order of the order is valid until it is vacated. That, the order that closed the probate matter could be challenged in a proper channel and to bring the same in this appeal which is against the revisional order No. 10 of 2018 is an afterthought.

On the argument that the primary court distributed the estate of the deceased the counsel for the Appellant responded that, at page one of the ruling the court indicated the person who distributed the estate thus the case of **Emmanuel Mweta** is distinguishable. He insisted that the case of **Ahmed Mohamed Al Laamar** is relevant to this matter because, as per the order of the primary court, the probate matter was closed. That, before the district court could issue revisional order, it was necessary to make an order to reopen the probate but no order was issued. That, since there is no such order, the order to close the probate remain valid and the district court was *functus officio* to reopen that probate matter. He added that this court is dealing with an appeal against revisional order and not the ruling of the primary court thus the

submission based on the primary court decision is misplaced or brought at the wrong time. The Appellant's counsel insisted that the prayer by the counsel for the Respondent that part of the revisional order be retained is not proper in the eyes of the law because the same was reached without according a party the right to heard. Regarding the issue of costs, he maintained the former prayer on account the Respondent is not the child of the deceased in the probate matter subject to this appeal. He thus prayed for the appeal to be granted with costs.

I have clearly considered the lowers courts records, the grounds of appeal and the submission by the counsels for both parties. Based on the brief facts as depicted on the first and second paragraphs of this judgment, it is without doubt that this appeal emanates from the Revision order of the district court in Civil Revision No 10 of 2018. It is not disputed that the revision was preferred suo motu by the district court after it received a complaint letter from the Respondent complaining on the conduct of the primary court of failure to attend the objection initiated before it. It is in record that after the file was opened based on the complaint letter the district court continued issuing a revision order without summoning any of the party to appear and address the court. Neither the Appellant nor the Respondent was called upon to address the

court of the revision matter before the district court. On that basis, both parties were not accorded the right to be heard. There are plethora of authorities insisting on clear practice of hearing the parties before the decision affecting their interest is made. The Court of Appeal in the case of **M/S Darsh Industries Limited Vs M/S Mount Meru Millers limited**, Civil Appeal No 144 of 2015 CAT at Arusha (Unreported) cited with approval its own decision in the case of **Abbas Sherally and Another Vs Abdul Fazalboy**, Civil Application No. 33 of 2002 where the court emphasised the right to be heard and stated as follows: -

*"The right of a party to be heard before adverse action or decision is taken against such party has been stated and emphasised by the courts in numerous decisions. That right is so basic that a decision that 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 violation is considered to be a breach of natural justice."*

Based on the above settled position of the law and in considering that the District Court made a revision order without according the parties the right to be heard it is my firm stand that the said order by the District Court cannot be left to stand. The 1<sup>st</sup> and 5<sup>th</sup> grounds of appeal are of merit.


Reverting to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> grounds of appeal, it was contended that the district court erred in issuing a revision order while the probate No 186/2013 was already closed making the court *funtus officio*. It is my settled view that, since this court finds merit in the 1<sup>st</sup> and 5<sup>th</sup> grounds of appeal that the parties were denied right to be heard the error which nullifies the whole proceedings and order of the district court, it becomes obvious that discussing other grounds of appeal becomes an academic exercise.

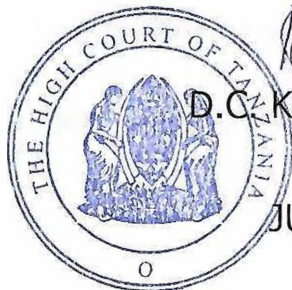
It was contended by the counsel for the Respondent that there were inconsistencies in the primary court proceedings and orders thus this court should partly allow the revision order by making an order that the matter be remitted to the primary court for both parties to be heard. I do not agree with this proposition on the very reason that, whether there were inconsistencies in the records of the primary court, the same were to be addressed before the district court upon both parties being accorded the right to be heard.

In the upshot, I find this appeal full of merit and same is hereby allowed. The revision order of the district court in Civil Revision 10 of 2018 is hereby quashed and all orders arising there from are set aside. This matter is remitted back to the district court for both parties to appear and

address the court on the revision proceedings. Since the revision before the district court was raised suo motu by the court, no order for costs is issued in this appeal.

**DATED** at **ARUSHA** this 25<sup>th</sup> day of April 2022

  
D.C. KAMUZORA  
JUDGE

The seal of the High Court of Tanzania is circular. It features a central emblem with two figures flanking a shield, topped by a crown. The text "THE HIGH COURT OF TANZANIA" is inscribed around the perimeter of the seal, and a small "0" is located at the bottom center.