

**IN THE HIGH COURT OF TANZANIA
TEMEKE SUB - REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

PC. CIVIL APPEAL NO 61 OF 2022

*(Arising from Probate Appeal No. 05 of 2022, Temeke District Court at One Stop Centre
Originating from Probate and Administration Cause No. 119 of 2020 at Magomeni Primary
Court)*

RAJABU NGONGE MKUPA.....APPELLANT

VERSUS

TAMASHA SHAHA.....RESPONDENT

JUDGMENT

Date of last order: 11/07/2023
Date of Judgment: 14/07/2023

OMARI, J.

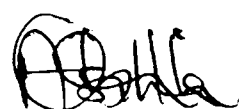
The Appellant was appointed as the Administrator of the estate of the late Hamisi Selemani Machemba on 21 August, 2020 in Probate Cause No. 119 of 2020 at the Magomeni Primary Court. As shall be seen in the course of this judgment in so many ways this matter is like a tale never loses in the telling, for now it suffices to say that the Appellant's appointment was revoked on 05 October, 2021. And, I am writing this judgment because vide Probate Appeal No. 05 of 2021 at the District Court of Temeke at the One- Stop Judicial Centre



(the OSJC) the Appellant filed an appeal challenging the Ruling of 05 October, 2021 by the Magomeni Primary Court in Probate Cause 119 of 2020 which revoked his appointment as the administrator.

The Temeke District Court at the OSJC upheld the trial court's decision and order to revoke the appointment and ordered the Respondent to administer the estate of her late husband and to file the final accounts within three months of the judgment. Dissatisfied the Appellant preferred this Appeal on the following grounds:

1. That, the district court magistrate erred in law and facts for delivering its judgement without passing through the trial court records and insisting that the Appellant did not file accounts and inventory of the deceased's estate while the same was filed at the trial court on time challenged by the Respondent of which made the court as co-Administrator.
2. That, the district court magistrate of Temeke erred in law and facts by delivering its decision which contradicted with the decision of the Kinondoni District Court which had already nullified the revocation of the trial court over the same matter.
3. That, the district court magistrate erred in law and facts for upholding the decision of the trial court Ruling without considering the submission made



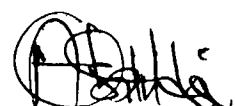
by the Appellant on the reality for violation of the doctrine of *Res-Subjudice*.

4. That, the district court magistrate erred in law and fact by upholding the decision of the trial primary court which revoked the appointment of the Appellant as the administrator prematurely after the Respondent as a co-Administrator.

On the basis of the above the Appellant prayed for orders that the Appeal be allowed, to set aside the decision and all orders of the Temeke District Court at the OSJC and to order for both parties to be co-Administrators.

When the Appeal was called for hearing the Appellant had the services of Johnstone Fulgence and the Respondent had the services of Hassan Chande, both learned advocates.

Mr. Fulgence submitted on the four grounds of appeal as they are in the Memorandum of Appeal. He averred that Appellant was appointed as the Administrator of the deceased estate and by 29 March, 2021 the Appellant had prepared the inventory and the accounts of the estate and filed them in court where the court issued a notice of appearance to the beneficiaries to come for a hearing of the same. The Respondent objected that the two documents are not right. To solve that problem the trial court also appointed the Respondent




as a co – Administrator. They were then directed by the trial court to file an inventory and accounts of the estate within four months from the date of the appointment.

Therefore, the learned advocate contented that the order of the Temeke District Court at the OSJC that the Administrator did not file inventory and accounts of the estate was wrong and is predicated on the magistrate not going through the file of the trial court. Concluding on this ground the learned advocate stated that in so far as the Appellant who was the first Administrator filed the said documents and they were challenged thus, it was the responsibility of the magistrate to go through the record before ordering as he did.

On the second ground of Appeal the learned advocate submitted that the Respondent was not satisfied with the Appellant's appointment and she filed Probate Appeal No. 26 of 2020 challenging the said appointment but was unsuccessful. She then went back to the trial court to pray for revocation of the letters granted to the administrator. Then Probate Appeal No. 50 of 2021 was also filed.

The learned advocate argued that he addressed this issue in the district court stating that Respondent was making multiple applications with appeals existing which is contrary to the law. The Temeke District Court at the OSJC in its 28 July, 2022 decision did not consider this legal argument and upheld the decision

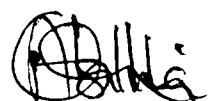


of the trial court revoking the grant to the administrator albeit fact being Kinondoni District Court had already quashed the said decision in Probate Appeal No. 50 of 2021.

He continued to submit that decision of the District Court Temeke at OSJC conflicts with the decision of the District Court of Kinondoni. In his view the District Court of Kinondoni was the court with competent jurisdiction to uphold or quash the decision of the Primary Court. He continued to submit that he is saying this because the genesis of this matter is Probate Cause No. 119 of 2020 at the Magomeni Primary Court which was before the Temeke District Court at the OSJC became operational.

On the third ground the learned counsel submitted that when in the Temeke District Court at the OSCJ the issue of *res subjudice* was the one of the grounds of appeal and also was something that was submitted on extensively. The learned counsel contended that in its judgment the said court stated it as one of the grounds of appeal yet they did not elucidate on the same in making the decision.

He submitted that the Magistrates Courts Act, Cap 11 RE 2019 (the MCA) has no precise provisions on *res subjudice* however Rule 11 and 12 of the Magistrates Courts Act (Civil Procedure in Primary Courts Rules) GN. No. 310 of 1964 it tries to explain *res subjudice* however in the context of *res judicata*.



He further submitted that there being no clear provision then the Civil Procedure Code Cap 33 RE 2019 can be applied, specifically section 8 and 9 which have prohibited any court from hearing a matter that is *res subjudice*.

Therefore, the learned advocate argued that the act of the Primary Court Magomeni hearing a matter to revoke the grant to the Appellant who was the co-Administrator at the time while there was an ongoing Appeal filed by the Respondent at the Kinondoni District Court violated the principle of *Res subjudice*.

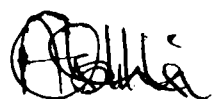
The learned counsel made reference to the cases of **Ravji Construction Limited v. Mohamed Enterprises (Tanzania)Ltd and Murtaza Ali Hussein Dewji**, Civil Case 59 of 2023, **The Managing Director, ABSA Bank Tanzania Limited (Formerly Known as Barclays Bank (Tanzania)) Limited v. Felician Muhandiki**, Civil Application No. 37/01 of 2021 and the case of **Kawe Apartments Limited v. Exim Bank Limited**, Land Case No. 146 of 2020. The cases cited by counsel deal with the principle of *res subjudice*. He concluded that the decision of Temeke District Court was against the principle of *res subjudice*.

On the last ground of Appeal, the learned counsel submitted that the Administrator after filing the inventory and accounts of the estate which were challenged by the Respondent and later on appointed and added as co –



Administrator. He averred that it is not right to say that the Appellant had not filed the inventory and accounts occasioning the delay of the administration and lapse of 4 months. He further stated that under Rule 10(1) of the Primary Courts (Administration of Estates) Rules GN. No.49 of 1971 (the Rules) it is clear that an inventory and accounts of the estate is to be filed within 4 months. From the date the Respondent was added as co-Administrator only 3 months had lapsed. This according to the Appellant's counsel depicts that the Respondent had all along intended to remain alone as an administrator that is why even after being appointed as co-Administrator she went on to appeal the decision making her co-Administrator. Therefore, the decision of the Temeke District Court at the OSJC that the Administrator had not filed the inventory is not right.

The Appellant's counsel went on to aver that his client is fearful of the relationship between the Respondent and the magistrate at Temeke District Court at OSJC. After alleging that the Respondent had no blessing of the other heirs when she applied for the revocation the learned counsel prayed that the Appeal be allowed without costs because it concerns members of the same family and the decision of the Temeke District Court to be quashed and set aside. He further prayed that this court declare that the decision of the Kinondoni District Court was correct for it is the one with jurisdiction and the

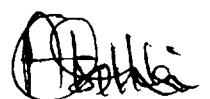
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co- Administrators be ordered to continue with administration and file the inventory and accounts at the Magomeni Primary Court within four months.

When it was his turn, Mr. Chande contested the Appeal by stating that the decision of the Temeke District Court at the OSJC was a just decision because the Appellant and first administrator was revoked because he was not holding meetings, he was not ascertaining the deceased's properties or even debts and other needs of the beneficiaries especially bearing in mind some of them are young children and some are students who had to leave school. He went on to submit that it was after the widow complained that the trial court added the widow (the Respondent herein) as a co-Administrator, however, the Appellant was not cooperative and made the co-administration very difficult.

The learned advocate submitted further that the Appellant was in control of all the properties of the estate and he has not been cooperating with the heirs or co-Administrator. He also alleged that the Appellant has been collecting proceeds of the business and has not been giving the proceeds to the heirs he has been paying debts unknown to the heirs and misusing the estate.

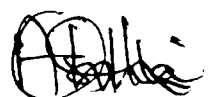
On the second ground of appeal the learned counsel submitted that the Respondent did not have any legal representation or assistance in the trial court and when she preferred the appeals. He further explained that the midst of



difficulties she was facing she was not attending court which led to the appeal to be dismissed.

Submitting on the third ground of appeal the learned counsel was of the view that the district magistrate considered the rights of the heirs in making the decision. He added that the magistrate, after considering the wrong doing of the first Administrator that is the Appellant, thought it is wise to revoke his appointment so that only the Respondent remains as the Administrator of the estate. He argued that this falls under section 95 of the CPC which provides for inherent powers of the court, because the first Administrator was diminishing the estate and if allowed to continue the remaining heirs would not get anything. The learned advocate averred that after the 28 July, 2022 judgment the family met 02 October 2022 and 13 October, 2022 final accounts were filed pending the assets that were with the revoked Administrator.

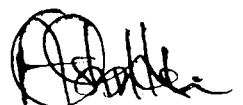
After submitting this on behalf of the Respondent the learned advocate stated that the Appeal lacks merit and prayed that it be dismissed with costs and the properties of the deceased that were itemized in the inventory to be restored to the state they were in with exclusion of those already with the lawful heirs. He further prayed that Appellant to agree to adhere to the judgment of Temeke District Court at the OSJC and the lavish spending of the estate monies be reimbursed to the estate. He stated that all of these prayers are supported by



the decision of the case of **Joseph Shumbusho v. Mary Grace Tigwelwa & 2 others**, Civil Appeal No. 183 of 2016.

In rejoinder, Mr. Fulgence learned advocate for the Appellant started by submitting that when the Respondent was filing the amended accounts and inventory they knew this Appeal had already been preferred. He added that the Appeal was filed on 28 February, 2022 while the inventory was filed on 13 October, 2022 when they already received the Memorandum of Appeal. In his view, this was done purposefully so that they look they are doing well in the administration of the estate. He contended that what is strange is that they have filed the inventory at the Temeke District Court at the OSJC while the matter is at Magomeni Primary Court; which means in the Probate of No. 119 at Magomeni Primary Court the inventory and accounts have not been filed. He further contended that the said inventory and accounts are in English while according to section 13(1) of the MCA the language of the Primary Court is Kiswahili. Therefore, there is no inventory filed in the trial court.

On the submission that there were no meetings, the learned counsel disputed this as not being true. He stated that there were meetings and the widow did not participate stating she is awaiting her appeal. On the submission that the Respondent had no legal representation; the learned advocate argued that ignorance of the law is no defence and the submission cannot be true anyhow



since she had filed Probate Appeal No. 26 of 2020 which was handled by a lawyer.

The learned advocate went on to argue on counsel's submission that the magistrate decided the way he did as he was considering wisdom. He vehemently disputed this line of argument and stated that when there is a law it has to be adhered to, magistrates work as per the law not the wisdom they bring to the court from home. He went on to submit that, as for the section 95 of the CPC in this instance the district court did not have inherent powers because to have inherent power you must have jurisdiction and the Temeke District Court at the OSJC did not have jurisdiction on the matter and there was nothing that would have necessitated the exercise of such powers anyhow.

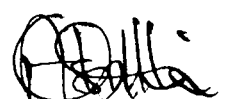
Additionally, the learned advocate submitted that the family meeting that they are purporting to have held if one were to look at the minutes some of those who signed are young children of 3 and 4 years and some of the other children were away in school. He went on to argue that some of the heirs did not sign, and the document is basically forged. The learned counsel further explained that the businesses were in rental properties and when the lease ended the landlord did not want to renew thus the Appellant can not be blamed for that, likewise he should not be faulted for the proceeds of the businesses since some of the heirs are the ones receiving the said proceeds. He concluded his rejoinder

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by stating that the Respondent's prayer that the Appellant be ordered to return properties counsel did not state which properties were to be returned therefore this court cannot make an order on the same for nothing specific was named. He then prayed for this court to quash the decision of the district court with costs.

Having gone through the parties' submissions for and against this appeal in detail I find that the only issue for this court to determine is whether this appeal is meritorious. I will do so by generally going through what I have observed in the record and the parties submissions and then segue back to the grounds of appeal. In doing so, I am alive to the fact that this being a second appellate court, it is not expected to disturb the lower courts' concurrent findings unless there is a misapplication of the law or misdirection of the evidence as was held in **DPP v. Jafari Mfaume** [1981] TLR 149 see also **Amratlal Damodar Maltaser and Another T/A Zanzibar Silk Stores v. A.H Jariwalla T/A Zanzibar Hotel** [1980] T.L.R 31.

The Appellant's grant was revoked on 05 October, 2021. This was preceded by a complaint from the Respondent, who was at the time the co-Administrator that the Appellant was not cooperating. The Respondent who remained as the Administrator was ordered to file an inventory and accounts by 05 February,



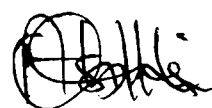
2022 as per Rule 10 of the Rules. I have gone through the trial court's record, and saw that albeit there being a complaint letter from the Respondent objecting the distribution there are no Form No. V and VI which are the inventory and accounts of the estate. It is not clear in the record how the objection was sustained without the Form No. V and VI having been filed in court. However, the trial court's proceedings depict that on 31 March, 2021 the then Administrator is recorded to have said:

'Naomba kukabidhi warithi mrejesho wa mgawanyo wa mali'

This in my understanding means that the Administrator had presented in court some form of an inventory and or accounts which led to the trial court issuing an order for the heirs to submit their comments in writing by 16 April, 2021. On the said date the matter was adjourned to 07 May, 2021 when the Respondent informed the court:

'Tunaleta mchanganuo na mgawanyo'

The matter was then adjourned to 24 May, 2021, further to 28 May, 2021 and to 03 June, 2021 when the court proceeded with hearing. Without going into the minute details of the nature of the hearing and prayers sought, one is inclined to ponder on the non-filing of the inventory and accounts by the then administrator which was mooted as one of the grounds that led to the 05



October, 2021 revocation which was then upheld by the Temeke District Court at OSJC.

There was an order that was made upon appointment of the Appellant as administrator which is confounded by the fact that the court actually ordered that the Administrator was to close the administration in 120 days, which should have been 19 December, 2020. Yet, at the time there was an on going Probate Appeal No. 26 of 2020 at the District Court of Kinondoni. The trial court cannot pretend it was unaware of this since the proceedings show on 01 March, 2021 the Appellant stated:

'Mimi bado sijagawanya mali kwa sababu wao walikata rufaa Mahakama ya Wilaya na hukuni (sic) ulifika (sic) tarehe 11/01/2021.'

This was followed by an order by the trial court to the Appellant to distribute the estate and a hearing set for 3 March, 2021 the events of which I have already elucidated on herein above. The Respondent was appointed as the co-Administrator on 30 July, 2021, this was followed by an order for exhibiting the inventory and accounts by 30 November, 2021. Post 30 July, 2021 there is no inventory that has been filed up to 05 October, 2021 when the Appellant's appointment was revoked.



It would seem that because she was aggrieved by the 30 July, 2021 Ruling the Respondent preferred Probate Appeal No. 50 of 2021 centred on the trial court's decision to add her as co-Administrator instead of revoking the Appellant's appointment. In the said appeal the Appellant filed a cross appeal centred on addition of the Respondent as co-Administrator. The Respondent's appeal was dismissed for want of prosecution and the cross appeal was heard *ex parte*.

In the decision of the cross appeal the learned magistrate noted the absence of inventory and accounts. In addition to that on page 8 of the decision the magistrate also noted that upon perusal of the primary court records it appears that on the 05 October, 2021 Ruling that revoked the Appellant's appointment was done post the filing of an appeal, thus declared the revocation as a procedural irregularity, quashed it and set aside the decision and upheld the order to have the two co-Administrators and ordered them to cooperate in the administration and file the inventory and accounts within three months from 11 February, 2022.

The record seems to be convoluted, however, from the decision of Probate Appeal No. 50 of 2021 which is in the courts file it is clear that the Revocation was done in the pendency of an appeal. The said appeal was filed on 01 September, 2021. Thus, as held by the learned magistrate in Probate Appeal



No. 50 of 2021 the said revocation was unprocedural. This in effect goes into the propriety of the decision of Probate Appeal No. 05 of 2021 that upheld the decision of the magistrate to remove the Appellant from co-Administration of the estate. The reasoning of the learned magistrate was correct to the extent that the requirement of filing an inventory is a compulsory one, and one that has directions in so far as the time to do so. However, when one goes back to the record of the trial court they would see that what led to the Respondent being appointed as co- Administrator on 30 July 2021 is an objection regarding distribution of the estate submitted by the Respondent on 09 April, 2021 which makes reference to the inventory and as already alluded to the same is not in file.

The 30 July, 2021 Ruling made an order that the Administrators to report (file an inventory and accounts of the estate) by 30 November, 2021 which is a period of four months. This order would have rendered the 21 August, 2020 Order to the Appellant ineffectual as he now has to act as a co-Administrator as well as the documents being challenged.

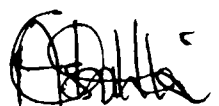
As already stated, on 07 September 2021 the trial court received an undated letter from the Respondent complaining that the Appellant is not cooperating with her as co-Administrator, which the Appellant replied in contest on 07

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September, 2021. This is what led to the 05 October, 2021 Ruling revoking the Appellant's appointment and leaving the Respondent as a sole administrator. It should be noted that by then Probate Appeal No. 50 had already been filed and was on going at the Kinondoni District Court. I shall not go into the Respondent counsel's contention that the Temeke District Court at OSJC exercised wisdom and inherent powers in ignoring that anomaly so as to protect the estate for the obvious reason that contention is an embellishment of what inherent powers entail as well as seeking to feign that a court can disregard the law and be guided by wisdom.

The Appellant's appeal in Probate Appeal No. 05 at the Temeke District Court at the One-Stop Judicial Centre was hinged on challenging the 05 October, 2021 order. The magistrate therein found that the revocation was right. On the basis of failure to abide to the Rules and upheld the decision, ordered the remaining administrator to file final accounts within three months from 28 July, 2022.

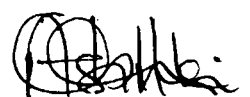
while I agree with the learned district magistrates reason that being an administrator does not give one ownership of the estate as was decided in **Tausi Hassani and another v. Salum Hassani** (2014) TLR 617 and that when one does contravene then the appointing court has powers to revoke the said appointment as per section 2 (c) of the MCA. Likewise, I agree with the



reasoning that co-administrators have to work together and cooperate in the course of their duties as the learned magistrate has rightly garnered from the case of **Maya Mgaya v. Salim Said (the administrator of the estate of the late Said Salehe) and another** (2019) TLR 486 and the fact that the Respondent has reported the Appellant for *inter alia* failing to cooperate with her. This as I have already elucidated was what led to the revocation on 05 October, 2021 however, as already observed it was done during the pendency of an appeal. Moreover, the record suggests there was atleast an attempt to file the documents but it was confounded by the objection and made ineffectual by the addition of the co-Administrator.

As I progress towards penning off let me give a voice to several things that have come out in the parties submissions and or the lower court's decision even if its just for discourse sake since they make no difference in the outcome of the appeal.

Though not one of the grounds of appeal but something that the Appellant mentioned in the submissions and for the interests of justice I find it prudent to observe that having gone through the trial court's file, there is still no inventory or accounts of the estate. Rather the same seem to have been filed in the District Court of Temeke as part of Probate Appeal No. 05 of 2021 on 13



October, 2022 which I agree with the learned counsel for the Appellant is not only the wrong forum but also the wrong format for the same should have been filed in the trial court in the form of Form No. V and No. VI. The Appeal having been completed the Respondent should have filed the requisite forms in the trial court and not the appellate court.

Another matter I would like to comment on is that during the submissions the Appellant's advocate contended that the District Court of Temeke at the OSJC had no jurisdiction to hear the appeal as the matter predates its operationalization vide GN. No. 640 of 2021 of 27 August 2021 and more so because the Respondent had already appealed to the Kinondoni District Court. To put all this in perspective, Probate Appeal No. 05 of 2021 at the Temeke District Court at the OSJC was filed by the Appellant on 03 November, 2021 and decision rendered on 28 July, 2022 while the decision for Probate Appeal No. 50 of 2021 filed by the Respondent and wherein the Appellant had a cross appeal was rendered 11 February, 2022. It is clear that both parties are somewhat blameworthy for abuse of court process. Additionally, it is also clear that when the revocation vide the 05 October, 2021 Ruling was being ordered there was a pending appeal.

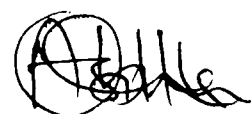
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On the Temeke District of Temeke at the OSJC not having jurisdiction on a matter that predates it; it is my considered view that GN. No. 640 of 2021 of 27 August 2021 that establishes the OSJC gives the court jurisdiction to hear all matters of a probate nature originating from Dar es Salaam Region as stated in Regulation 2:

'There is hereby established the one One-Stop Judicial Centre of Temeke at Temeke High Court Sub-Registry for the purpose of speedy and effective trial of probate and administration causes and matrimonial matters originating in Dar es Salaam Region.'

Therefore, only reason the said district court lacked jurisdiction was the fact that there was already an appeal and proceedings for revocation all at the same time in various courts. Otherwise the District Court of Temeke at OSJC would be the court with jurisdiction to hear any appeal that is preferred after its establishment in accordance to GN. No. 640 of 2021 of 27 August 2021.

Furthermore, in submission the Appellant's advocate contended that the District Court of Temeke at OSJC did not have jurisdiction on the basis of the principle of *res subjudice* being contravened and cited Rule 11 and 12 of the Magistrates' Courts (Civil Procedure in Primary Courts Rules) GN. No. 310 of 1964, section 8 of the CPC and the cases of **Ravji v. MeTL** (supra), **The Managing Director, ABSA Bank Tanzania Limited (Formerly Known as Barclays**



Bank (Tanzania) Limited v. Felician Muhandiki (supra) and the case of **Kawe Apartments Limited v. Exim Bank Limited** (supra) all of which discuss the principle of *res subjudice* extensively. The Respondent's counsel did not contest or refute this contention, in fact he maintained that the learned magistrate was exercising wisdom and inherent powers. Bearing in mind the background I have given on this matter it is difficult to disagree that at some point there were proceedings in more than one court over the same subject matter by the same parties at some point in the elucidated timeline.

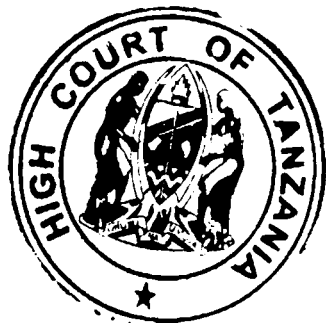
Having gone through the grounds of appeal with the aid of the parties submissions and the record I find that in this case I cannot agree with the two lower courts.

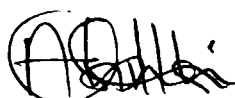
This is so, because as already stated, after going through the lower courts record I find the 05 October, 2021 Order to revoke the Appellant's appointment as the co-Administrator unprocedural thus, null. It is therefore quashed and set aside. The decision and order of the Magomeni Primary Court of 30 July, 2021 is reinstated and the co-Administrators to finish the administration by exhibiting the accounts of the estate within 90 days from this judgment. In effect the decision and all orders of the Temeke District Court at OSJC is also quashed and set aside.

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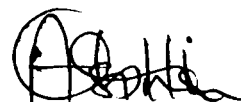
This being a matter that involves members of the same family, I make no orders as to costs.

It is so ordered.




A.A. OMARI
JUDGE
14/07/2023

Ruling delivered and dated 14th day of July, 2023.


A.A. OMARI
JUDGE
14/07/2023