

**THE UNITED REPUBLIC OF TANZANIA**  
**JUDICIARY**  
**IN THE HIGH COURT OF TANZANIA**  
**(DISTRICT REGISTRY OF MOROGORO)**  
**AT MOROGORO**

**PROBATE APPEAL NO. 11 OF 2022**

*(Arising from Probate Appeal No. 2 of 2022 District Court of Morogoro)*

**LEILA SULEIMAN YANGE ..... APPELLANT**  
**VERSUS**

**RAHMA MOHAMED MABROUCK ..... RESPONDENT**

**JUDGMENT**

*Hearing date on: 23/02/2023*

*Judgment date on: 20/04/2023*

**NGWEMBE, J.**

This appeal is intended to challenge the decision of the District Court of Morogoro in Probate Appeal No. 02 of 2022. The district court exercised its appellate jurisdiction from original judgement meted by Morogoro Urban Primary Court in Probate and Administration Cause No. 138 of 2017.

The background of this appeal is necessary to recap herein with a view to print out clear picture of its genesis. Yahya Suleiman Yange was a brother to Leila Suleiman Yange (the appellant) and Salma Suleiman Yange. Yahya died on 03/11/2016. His sister Salma Suleiman Yange was, on 15/08/2017 duly appointed as an administratrix by Morogoro Urban Primary Court in Probate Cause No. 138 of 2017.

The trial court's records indicate that, Marystella Louis was a widow survived by the deceased. Rahma Mohamed Mabrouck (the respondent herein) claimed to be also a wife of the deceased, filed her caveat against appointment of Salma. Upon full trial of the caveat, the

trial court dismissed it. Thus confirmed the appointment of the administratrix (Salma). In the cause of administering the said estate, unfortunate, on 26/9/2021 Salma (administratrix) died, while the work of administering the deceased estate is incomplete.

As a result, just one day after demise of Salma (27/09/2021) the family conveyed a meeting and proceeded to nominate Leila Suleiman Yange (the appellant herein) to take over the administration of the estate of Yahya Yange.

The newly appointed administratrix, applied in court for appointment as an administratrix. In turn the respondent unsuccessfully filed an objection to the appointment of the appellant. The main ground of objection was on none family meeting which appointed her as an administratrix. That the respondent and her children were not involved in the alleged meeting which appointed the appellant as an administratrix. Further, raised the issue of having no good relationship with the current administratrix and that the former administratrix was telling her that, she is not concerned with the estate of the deceased, something which took the former administratrix almost five years without filing an inventory.

The appellant adduced her evidence that they did not involve the respondent in the clan meeting because she was divorced from the deceased two years and a half before his demise and the respondent was remarried to another man who seem to have also divorced her as well. The trial court having considered the evidence from both sides the court overruled the objection and proceeded to appoint the appellant as an administratrix.

Such decision aggrieved the respondent, so she appealed to the District Court of Morogoro on grounds that, the trial court erred in: -



1. dismissing the objection while the respondent being the legal wife of the deceased did not participate in the meeting which nominated the appellant;
2. accepting that the respondent was divorced from the deceased while no proof of decree of divorce; and
3. failure to properly analyse the evidence on record.

The District Court found merit on the grounds of appeal. Thus, proceeded to quash the trial court's decision and orders, it also revoked the appointment of the appellant and appointed the respondent Rahma Mohamed Mabrouck as an administratrix of the estate in lieu. The appellant preferred an appeal to this court advancing five (5) grounds, which will not be reproduced herein for a reason to be apparent in the course.

On the date fixed for hearing, Ms. Levina Mtweve, learned advocate held brief of advocate Michael Mwambanga while the respondent appeared in person. This court ordered parties to proceed disposing off the appeal by way of written submissions. Consequently, this court proceeded to provide schedules of filing their written arguments. The appellant was ordered to file her written arguments on or before 9/2/2023, while the respondent ought to do same on or before 17/2/2023 and final rejoinder on or before 23/2/2023.

Despite the court's scheduling order, yet the appellant's submission in chief was filed on 10/2/2023, equal to one-day delay without any justification. The subsequent documents were filed on time. In a strange custom, the respondent filed another reply to rejoinder. In my understanding, same was made without leave of this court and under the circumstance there was no need. The respondent also defied the rule of procedure by filing the submission in Kiswahili and she

addressed this court in heading as "MAHAKAMA KUU YA TANZANIA, ILIYOPO (W) MOROGORO, MANISPAA YA MOROGORO MKOA WA MOROGORO" which in the language of this court she cited this court to be Morogoro District instead of being the High Court of Tanzania Morogoro zone. There are a lot of other features in the respondent's pleadings, which may not be worth to address at this juncture, also knowing that the lay respondent did not seek or need to seek legal Aid.

It is apparent and clear that the appellant did not comply with the court's order regarding filing of her written submission in chief. The general rule now developed is that, failure to file written submission on the dates scheduled by the court is tantamount to failure to appear on the date fixed for hearing. A good number of precedents have been decided and both never excused any party for delay even for a single day. For instance, in the case of **Haleko Vs. Harry Mwasaijala, DC Civil Appeal No. 16 of 2000**, this court held: -

*"I hold, therefore that the failure to file written submission inside the time prescribed by the court order was inexcusable and amount to failure to prosecute the appeal. Accordingly, the appeal is dismissed with costs."*

The position has been maintained in other cases like **Olam Tanzania Limited Vs. Halawa Kwilabya, DC. Civil Appeal No.17 of 1999** and **P 3525 LT. Idahya Maganga Gregory Vs. The Judge Advocate General, Court Martial Criminal Appeal No. 2 of 2002**. The ordinary remedy has been to disregard the pleadings or expunge the whole written submissions filed out of time. The direct consequence is dismissal of the appeal and in other cases *ex parte* decision may be entered.





Truly, the appellant delayed to file her submission by at least one day and the respondent in her written submission demands explanation as to why did the learned counsel defy the scheduling order. She went even further, questioning the mode of service effected to her. In our case the defaulter is the appellant and following the cases above, this court would have dismissed the appeal forthwith.

However, in studying the above precedents and many others, I have decided to proceed with this judgment. I am confident that, the above rules from precedents are from precedents as opposed to statutory. Equally important and to the best, the above precedents are not *absolute, untouchables and cannot be changed*. In the case of **Tanzania Venture Capital Fund Limited Vs. Igonga Farm Limited [2002] TLR. 304 (HCT)**, the defendant raised a preliminary objection concerning propriety of the plaint. The court ordered parties to argue the objection by way of written submissions. The defendant made its written submission in contravention of the court order. The plaintiff raised another preliminary objection that, the defendant's written submission be struck out because it was filed out of time. This court observed which observation I fully subscribe that: -

*"I am not aware of any provision in the Civil Procedure Code, 1966 governing the presentation of written submissions to the court. It is a practice of the court a very good practice – if I may be permitted to say so and which should be encouraged and supported by both the Bench and the Bar. In this particular case, I do not see how the plaintiff was prejudiced by the late filing of the written submissions by the defendant. It is a curable defect"*

With such attributes, the invocation of the rule on delayed filing as applied in **Haleko Vs. Harry Mwasaijale** needs some input of jurisprudence and legal reasoning. Without prejudice to the body of that rule, this court therefore holds a view that its application should be subjected to the tests of each case as it was so decided in the case of **Tanzania Venture Capital Fund Limited Vs. Igonga Farm Limited (supra)**.

In our case as earlier observed, the delay was that of a single day and all subsequent filing were timeous. I have reverted back to our previous decisions in similar cases where this court condoned the delay and vote to entertain the matter on merit.

Therefore, in some circumstances the court can overlook the said delay for the purpose of dispensing substantive justice, which in my theme is the overriding objective. One of those cases include **CRDB Bank Limited Vs. NBC Holding Corporation and Others [2002] TLR. 422** where this court took heed to the ends of justice as paramount factor when held: -

*"In my view the benefits behind the assistance to be rendered to the court by the tendering of the submissions for the ends of justice outweighs the otherwise technical stand which would be rendered by a refusal to exercise the discretion simply because of the Counsel's negligence."*

Apart from the delay being very short and considering the fact that the case at hand contains a serious question of law that, determines legality of the district court's orders, I am of the strong view that a position in **CRDB Bank Limited Vs. NBC Holding Corporation** fits to apply in this case. I therefore take a justified courtesy and pardon the delay, instead of dismissing the appeal for such delay, I will go into




merits as if both parties made their submissions within time. In the exercise of reasonable caution, I am sure that pardon in the circumstance of this appeal does not injury any party to this appeal, neither law nor justice.

As is so decided and going to the merits of this appeal, the appellant's counsel dropped all other grounds and maintained the first ground, that the district court erred in law by appointing the respondent to be an administratrix while there was no application before it. This ground brings in the main contention on whether the district court was properly guided by law to appoint the respondent to be an administratrix of the deceased estate?

To resolve this issue, this court has deeply considered the parties' submissions. Advocate Mwambanga seem to be clear and straight forward in his submission that, the district court was not entitled to appoint the respondent who did not apply for such appointment. The respondent would properly be considered for taking over the office of the administratrix if she had applied for same. Even upon application, the law ought to be adhered to.

He proceeded to justify his assertion by referring this court to section 2 of the 5<sup>th</sup> **Schedule to The Magistrate's Courts Act, Cap 11 RE 2019**. Argued further that, powers to appoint an administrator where the law applicable is Customary or Islamic law, is vested to the Primary Court. To him, the district court in exercising its appellate jurisdiction ventured into an unchartered territory and assumed the powers it does not possess.

Went further by referring to this court's decision in the case of **Annath Athuman Maseko Vs. Lilian Kirundwa Rajabu (Civil Revision No. 1 of 2021) [2021] TZHC 9102**, where this court



declined to appoint the applicant as an administrator on the reasoning that, when revising the lower court's decision, the court does not embark itself on matters supposed and capable to be determined by a proper application. Concluded that appointment of the respondent by the district court was wrong.

The respondent's submission was informal and raw. Apart from being devised in Kiswahili language, it went into other matters irrelevant to the appeal. The respondent carelessly throws serious blame to the appellant's advocate in words among others that; "*wakili wa mwomba rufaa ni mkaidi naona ameizoea mahakama yako*" That the appellant's advocate is obstinate and stubborn and purport to be accustomed to the court. The allegation is hard to comprehend. To maintain my focus, I need to ignore it as I hereby do.

However, recollecting from her submission, the respondent claims that, the district court was correct in revocation of the appellant's appointment as she secured the same by fraud and that the appellant misappropriated the deceased estate. The district court was correct to appoint her in lieu thereof as there were functions to deal with, including debt collection and distribution of the estate. She cited a lot of cases, statutes, the constitution and writings centring around the women's right to property in family law and probate law. I will not point any of the authorities as none of them was relevant to the appeal which is based on one ground as earlier demonstrated.

I accept the assertion of the appellant in her submission in chief and rejoinder that, powers conferred upon the Primary Court under Customary and Islamic law is exclusive to it and this court. Therefore, the district court though enjoys appellate jurisdiction over all cases decided by the Primary Court, yet those powers are limited to some



extent especially on the remedies. There are some orders the district court cannot make for two reasons. *One* – those orders require a proper application under a specified procedure of the law before a proper court. *Two* – being matters of exclusive jurisdiction of the Primary Court, limit the liberty of the district court.

Apart from the case of **Annath Athuman Maseko's case**, this court has maintained that the district court cannot exercise such powers on matters which came before it by way of an appeal especially, when the law applicable to the estate is Customary or Islamic law.

Rightly so, this court is cognizant of the widows' rights and all other entitlements that the respondent attempted to assert. Also, such rights deserve protection by this court and other respective institutions. However, what this court is tasked to determine in this appeal does not in any way touch anything relevant to those rights. Instead, the issue for determination is whether the revocation of the appellant's appointment and respondent's appointment in lieu were proper in law and under the circumstance of this appeal?

Having revisited the law along with precedents, which offers a good interpretation to the statute, I am satisfied that the appellant's argument is within the applicable laws and precedents. To the best, the district court was justified to determine the appeal before it, but lacked jurisdiction to appoint the respondent in lieu of the revoked appellant's appointment.

Three reasons may justify the above conclusion: - *first* –the respondent did not apply for appointment as an administratrix; *second* – even if she could apply for appointment as an administratrix, yet the district court had no power to do so, for such appointment is under exclusive jurisdiction of Primary court; *third* – the reasons for revocation

were not sufficiently advanced and the district court seem to have been strayed by the issue of whether the respondent was the legal wife of the deceased and other questions in respect of the true heirs of the deceased estate which were irrelevant altogether.

There are current precedents of the Court of Appeal in similar considerations, in the case of **Mariam Juma Vs. Tabea Robert Makange, Civil Appeal No. 38 of 2009, (CAT – Dsm)** and **Stephen Maliyatabu and another Vs. Consolata Kahulananga, Civil Appeal No. 337 of 2020, (CAT – Tabora)**. In the latter case, the Court of Appeal followed the former as follows: -

*"The follow up question is whether the High Court judiciously exercised its discretion to appoint the administrator of estate of the late Elias Rukonga Maliyatabu in accordance with the law? Our answer is in the negative and we say so because it is unfortunate that the High Court considered extraneous factors and proceeded to adjudicate on them which dents a judicious exercise of discretion in appointing a person fit to administer estate of a deceased person."*

Above all, the district court ought to be cautious before it could vary the trial court's decision. Generally, it was bound to be sure that the discretion was exercised in the manner warranting interference to the appointment of an administrator. The general factor was provided for in the case of **Mbogo and Another Vs Shah [1968] 1 EA 93** where the Court held: -

*"I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which*





*it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."*

In similar vein, the decision in **UAP Insurance Tanzania Ltd Vs. Noble Motors Limited, Civil Application No. 260 of 2016** is much relevant on the exercise of discretionary powers. In the proceedings before the Primary Court, I have failed to find any misdirection in appointing the appellant. The district court did not point any. It is even amazing that the first appellate court proceeded to revoke the appellant when she has discharged almost all of the substantive duties. According to the trial court's proceeding, an appointed day was scheduled for the closure of the probate. Reasonability brings in a lot of questions, what was the purpose of revocation of the appellant; and what was the task the respondent was appointed to perform. If the appellant was revoked due to fraud or misappropriation of the deceased estate, the follow up question is what actions did the court order/direct when revoked her appointment? I do not think the alleged misappropriation of the deceased estate and the alleged fraud were properly established to ground revocation.

Considering inquisitively on the first appeal's court in light of law and facts, I have observed that, the appellate Magistrate used three different signatures in the same file. The handwritten proceeding had a consistent signature. That signature appeared in no other place, instead the copy of judgment bore two different signatures. Yet another different signature was used in the decree. Although a person may have more than one signature, it is my considered view, that a magistrate must, as well as judges do, use only one signature throughout the



proceedings. Though I am not a handwriting expert, yet the differences of those signatures are vividly seen.

Notably, Order XX rule 3 of **the Civil Procedure Code Cap 33 RE 2019**, requires that a judgment be signed by the magistrate or judge who presided over the proceedings. In the proceedings before the district court reflect no change of magistrate, such apparent change of signatures had no basis at all.

Moreover, judges and magistrates are bound to follow the doctrine of sanctity of court proceedings as enshrined in the cases of **Paulo Osinya Vs. R.** [1959] EA. 353, **Halfani Sudi Vs. Abieza Chichili** [1998] T.L.R. 527 and **Shabir F. A. Jessa Vs. Rajkumar Deogra**, **Civil Reference No. 12 of 1994** among others. The doctrine demand that, there should not be apparent features subjecting the integrity of court proceedings be questioned.

All above observations arrive into one conclusion that, this appeal has merit, same is allowed. Having so concluded, I proceed to quash the district court's decision and its subsequent orders. The appellant should proceed with her duties of administering the estate of the deceased estate from the stage it stayed, while maintaining accountability.

Dated at Morogoro in chambers this **19<sup>th</sup> day of April, 2023.**



**P. J. NGWEMBE**

**JUDGE**

**19/04/2023**

**Court:** Judgement delivered at Morogoro in Chambers this 19<sup>th</sup> day of April, 2023 in the presence of Ms Levina Mtweve learned advocate



holding brief for Mr. Mwambanga for the appellant, and in the absence of the respondent.

**Right to appeal to the Court of Appeal explained.**

**Sgd: E. Lukumai**  
**Ag DEPUTY REGISTRAR**  
**20/04/2023**

