THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOROGORO DISTRICT REGISTRY

AT MOROGORO

PROBATE APPEAL NO 13 OF 2022

(Original from Probate and administration cause no. 29 of 2022, Morogoro District Court)

MARIA F. E MWAKITWANGWE ..... APPELLANT

VERSUS

JONATHAN KAIN MWAKITWANGWE ..... RESPONDENT

JUDGEMENT

Date of last order: 22/03/2023
Date of Judgement: 05/05/2023

MALATA, J

In the District Court for Morogoro the applicant (appellant herein) filed Probate and Administration Application no 29 of 2022 through chamber summons supported by affidavit seeking revocation of a granted of letter of administration of estate of late Firoz Ephraim Mwakitwangwe granted to Jonathan Kain Mwakitwange. Upon determination of the said application by the court, eventually the application was dismissed for lack of merit.

Aggrieved by the decision of the trial court, the appellant appealed to this court raising three grounds, that is to say;

1. The trial court erred both in law and facts by raising issue of capacity to sue *suo motto* and reaching its findings without affording the parties the right to be heard on a particular issue.
2. The trial court erred both in law and facts by not determining the application before it and proceeded to frame its own issues.
3. The trial court erred both in law and facts by writing a judgement that is wrong both in form and substance.

The appellant is therefore praying to this Court to allow appeal by setting it aside impugned decision with costs and order the application to be heard afresh before another magistrate.

When this appeal came for hearing both parties were represented, the appellant was represented by Mr. Jovith Byarugaba, learned Counsel while the respondent enjoyed the service of Mr. Jackson Mashankara, learned counsel.

Submitting in support of the appeal Mr. Byarugaba prayed to conjoin the **first** and **second** grounds and argue them together. This appeal originates from Misc. Probate and Administration No. 29 0f 2022 where the appellant herein moved the court to revoke the letter of administration

of estate of late Firoz Ephraim Mwakitwangwe granted to one Jonathan Kain Mwakitwangwe the respondent herein. His application was supported by the affidavit sworn by the appellant showing the reasons as to why the respondent was no longer fit for the work, he submitted.

The parties thereto were given right to be heard but the trial court did not consider the issues submitted by the parties as result the court raised *suo motto* an issue and decided on it without calling the parties to address on the same, the issue was on the capacity to sue or be sued as an administrator, he succumbed. That the trial magistrate invoked section 71 of the Probate and Administration of Estate Act, Cap. 352 R.E. 2002 which provides that,

> *"Whenever a letter of administration is granted, the same person shall have power to sue or prosecute any suit or act as representative of the deceased until such probate or letter of administration shall have been revoked or annulled."*

Mr. Byarugaba detailed that, this was purely a new issue which the parties were not given right to address on. The effect of so doing is that the parties were denied right to be heard on the same.

He asked this court to be guided by the principle in the case of **Said Mohamed Said vs. Muhusin Amiri and Muharami Juma**, Civil Appeal

No. 110 of 2020 the court of appeal decided that failure by the court to afford right to be heard to parties on the issue raised amounted to denial of right to be heard. Finally, held that the ruling and orders were a nullity. He asked the court to apply the same principle and hold it accordingly.

As to the last ground of appeal, he recapitulated that, a ruling must contain statement of facts, issues and reasons for the decision. This requirement is provided under Order XX rule 4 of the Civil Procedure Code. The impugned decision lacks such vital element of ruling/judgement thus denial to the parties to know the same. He stated that the ruling was a nullity and he directed this court to be guided by the decision in the case of **Abraham Wavi Kinyonga vs. Kereto Nanga Ndarivoi,** Land **Appeal no. 43 of 2019**, High Court, Arusha where the court decided that such a decision cannot be allowed to stand. He thus prayed the appeal to be allowed with costs.

In principal Mr. Mashankara was in support of the appeal save for the costs prayed by the appellant. He stated that it is not in dispute that the court raise the issue suo motto and the parties were not given right to address on the issue, as such they were denied right to be heard. He further submitted that the respondent was sued under individual capacity

not as an administrator the defect which is remediable by amendment not to dismiss the application in its entirety.

The issue for determination therefore is whether the parties were denied right to be heard on suo motto point of law raised by the court and whether the ruling did bear the content of the ruling/Judgement.

To start with, it is not in dispute that, ***first***, the trial court raised a point of law suo motto on the capacity to sue by the appellant herein and decided on the same and ***second***, likewise, it is not in dispute that the parties were not accorded the opportunity to address the trial court on suo motto raised issue. At this juncture, I find it crucial to point out that the right to be heard is fundamental one and has bearings to court's duty to have balanced story before entering the verdict. Unless there are cogent reasons for so doing, it will be contrary principle that any judgement must be arrived at after afford parties' right to be heard which is the cardinal principle under our article 13(6) (a) of our constitution. In **Said Mohamed Said vs. Muhusin Amiri and Muharami Juma,** (supra), had these to say;

> *"The next issue to deal with is what are the legal consequences of failure to afford to a party a hearing before any decision affecting his right is given? The settled law is to the effect that any breach or*

violation of that principle renders the proceedings and orders made therein a nullity even if the same decision would have been reached had the party been heard"

Also, in I. P. T. L Vs Standard Chartered Bank (Hong Kong) Ltd Civil Revision No.1 of 2009, the court categorically stated 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 interest of any person without first giving him a hearing according to the principles of natural justice..."

Having satisfied to the facts that, the trial court raise suo motto and determined the point without affording parties to address on the same, I am, therefore plain truth that parties were denied such right of which the trial court unilaterally determined in his ruling.

It is a trite law that when the court raises an issue which is likely to affect the decision and the right of the parties suo motto the parties must be afforded an opportunity to be heard on the raised issue. As the matter of fact, I am fortified that it was not proper for the trial court to raise the issue of capacity to sue and being sued suo motto in its the ruling and proceeded to determine the same without giving the parties opportunity

to be heard on it, in other words, it can be said that the trial court denied the parties the right of hearing their concern on the issue raised.

The omission is fatal, bearing in mind the sensitivity of the right to be heard which enshrined in Article 13 (6) (a) of the Constitution of United Republic of Tanzania of 1977 which is backed by the well-known principle of *Audi alteram Partem*, that is the right to be heard prior to the court verdict.

The Court of appeal has in numerous decisions emphasized that courts should not decide matters affecting rights of the parties without according them an opportunity to be heard because it is a cardinal principle of natural justice that a person should not be condemned unheard. See for example **D.P.P. v. Sabina Tesha & Others** [1992] TLR 237, **Transport Equipment v. Devram Valambhia** [1998] TLR 89 and **Mbeya-Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251, **Patrobert D. Ishengoma v. Kahama Mining Cooperation Ltd and 2 Others**, Civil Application No. 172 of 2016 (unreported) just to mention a few.

The right of a party to be heard was similarly discussed in the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed**

Fazalboy, Civil Application No. 33 of 2002 (unreported) in which the Court among other things observed as follows:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by 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 decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

All said and done, I am satisfied beyond sane of doubt that, the trial court's conduct amounted to deny of right to be heard on the suo motto raised issue by the court.

The question is what is the effect of such ruling entered in violation of the natural justice as echoed by article 13(6) (a) of our Constitution? the Court of appeal via the decision in **Said Mohamed Said vs. Muhusin Amiri and Muharami Juma**, (supra), where the court in principle propounded that, the settled law is to the effect that any breach or violation of that principle renders the proceedings and orders made therein a nullity even if the same decision would have been reached had the party been heard.

Also, in the case **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy**, (supra) the court of appeal cemented that the right of a party to be heard before adverse action is taken against such party has been stated and emphasized by 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 decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice.**

This being a High Court is bound to abide to the position by the superior court including in this case where the issue had already been settled.

Consequently, I adopt similar stand and hold that, the impugned decision is a nullity. As such, I find no need to proceed in discussing and making decision on the issue of contents of the ruling as the first issue suffice to dispose the matter at hand.

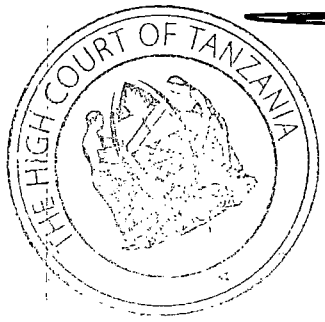
In the end, I hereby allow the appeal, reverse the trial court's ruling for being nullity. I further order that, the District Court for Morogoro is directed to proceed with delivery of ruling based on the application and submission made by the parties. Should the trial court consider necessary to inquire on the capacity of the appellant herein to sue or be sued, it

should invite both parties to address on it and compose a ruling accordingly.

As to the prayer for costs, I hereby decline to grant as neither of the party herein was involved in the advising the court, thence the decision.

IT IS SO ORDERED

DATED at **MOROGORO** this 5th May, 2023.



G. P. MALATA

JUDGE

05/05/2023