

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 51 OF 2021

(Arising from the District Court of Ilala in Probate and Administration Cause No. 40 of 2020)

ABELA GLORY MUTABIILWA MUYUNGI APPELLANT

VERSUS

MUBELWA JAMES MUTABIILWA.....RESPONDENT

JUDGMENT

13th June & 10th July, 2023

BWEGOGGE, J.

This is an appeal against the ruling and order entered by the District Court of Ilala in Probate and Administration of Estate Cause No. 40 of 2020. The respondent herein lodged an application for revision in the 1st appellate court praying the same to revise the decision of the Primary Court of Kariakoo entered on 13/7/2020 in Probate and Administration

151 of 1997. The first appellate court decided in favour of the respondent herein. The appellant herein, being aggrieved by that decision, he lodged an appeal in this court on six (6) grounds of appeal as hereunder rephrased: -

- 1. The learned Magistrate having admitted that the application for revocation of the letters of administration of the deceased estate, in practice, should be entertained by the actual court which issued the same, she erred in fact and law for entertaining the application for revocation of the letters of administration granted to the appellant.*
- 2. The learned magistrate erred in fact and law for entering an order that the respondent to file inventory and final accounts of the deceased estate whereas the letters of administration granted to the appellant remains valid.*
- 3. The learned Magistrate having admitted that notice to the general public in respect of the probate proceedings commenced in the trial court was duly published in Uhuru newspaper, she grossly erred in fact and law for concluding that the respondent was not duly served with the notice for appearance in court.*
- 4. The learned magistrate erred in fact and law for importing the rules of civil procedures in probate proceedings.*
- 5. The learned Magistrate erred in fact and law for assuming that the respondent was previously appointed the administrator of the estates of the late Ferdinand Mutagwaba Mutabiilwa contrary to the record of the trial court*
- 6. The learned Magistrate erred in fact and law for raising and deciding on a new matter which was not pleaded and argued by the parties hereto.*

Before delving the aforementioned grounds of appeal, I find it pertinent to recapitulate the facts of this case as gathered from the pleadings and records of the subordinate courts, albeit briefly as follows: Way back in 1994, the late Ferdinand Mutagwaba Mutabiilwa, the parent of the parties herein passed on. He was survived with seven (7) heirs, the parties herein inclusive. The respondent herein, petitioned and obtained letters of administration of estate of the late Ferdinand Mutagwaba Mutabiilwa in Probate and Administration Cause No. 151 of 1997 in the Primary Court of Kariakoo. Allegedly, the respondent failed to discharge his legal obligation of distributing the deceased estate to the lawful heirs. Consequently, in 2020 the appellant herein lodged an application for revocation of letters of administration granted to the respondent. The application was heard ex parte, following the appellants filing an affidavit in that the respondent herein and other beneficiaries of the deceased estate were out of her reach.

The application succeeded. And, the appellant herein was appointed an administratrix of estate of the deceased estate.

The respondent herein was not amused with the decision of the trial court and filed an application for revision in the first appellate court for examination on the legality of the decision entered by trial court. Upon the scrutiny of the records of the trial court records, the first appellate court found that the procedures for revocation of the respondent herein was not adhered to. Consequently, the decision of the trial court was nullified. The appellant herein was dissatisfied with the decision of the first appellate court. Hence, this appeal.

The appellant and respondent herein were represented by Messrs Nickson Ludovick and William Edward Ogunde, learned advocates. The counsels preferred to argue the appeal herein by written submissions. The substance of the counsel's professional mettle follows hereunder.

Mr. Ludovick, counsel for the appellant abandoned the 2nd and 4th grounds of appeal. And in substantiating the 1st ground of appeal, the counsel charged that the District Court had no jurisdiction to revoke the letters of administration issued to the appellant by the Primary Court of Kariakoo. That the letters of administration can only be revoked by the court that issued the same and not otherwise. The counsel cited the case of **Mwanahawa Muya vs Mwanaidi Maro** [1992] TLR 78 to bring home his point.

In validating the 3rd ground of appeal, the counsel argued that the decision of the first appellate court of revoking the letters of administration granted to the appellant was based on misconception of law and fact in that the appellant failed to issue notice to other beneficiaries whereas the appellant published the notice in Uhuru newspaper. Likewise, the appellant sworn the affidavit proving that the heirs were living in different areas and she had no contact with them. The counsel argued that in probate, publication of notice is construed as a complete service to the interested parties unless the court specifically directs that service be served to a specific person.

In respect of the 5th grounds the counsel submitted that the decision of the first appellate court is erroneous for assuming that the respondent was previously appointed the administrator of the estates of the late Ferdinand Mutagwaba Mutabiilwa contrary to the record of the trial court. The counsel asserted that the observation made by the first appellate court was not supported by the record of the trial court.

Further, the counsel alleged that the letters of administration purported to have been issued to the respondent was obtained by fraud and its authenticity is questionable on ground that the respective court

documents lack case number, seal or stamp, and title of the attesting Magistrate.

And, in support of the 6th ground of appeal, the counsel charged that the rules of procedures were not observed by the first appellate court. That it is the requirement of the procedural law that when the court *suo motu* raises a new issue when composing a judgment, the court must give an opportunity to the parties to address the court on that particular issue.

The case of **Tabu Ramadhani Mattaka vs. Fauzia Haruni Saidi Mgaya** (Civil Appeal 456 of 2020) [2022] TZCA 89 was cited to make a point. That the first appellate court deviated from deciding the main issue of revocation and focused on discussing procedural errors without giving the appellant the right to submit thereto. Hence, the appellant was denied a right to be heard. This is all about the appellant's counsel submission.

On the other hand, the Mr. Ogunde, counsel for the respondent, in countering the argument made with regard to the 1st ground of appeal, submitted that the first appellate court was invited to call for the records of trial court in Probate and Administration Cause No. 151 of 1997 in order to satisfy itself as to the correctness and legality of procedure, proceedings and the decision reached thereof. The first appellate court exercise its powers under Section 22(1) of the Magistrates' Courts Act

[Cap 11 R.E 2019] and was satisfied that the procedure for revocation of the letters of administration granted to the appellant was not followed. That the record entails that appellant herein lodged the complaint and prayed for revocation of letters of administration granted to the respondent based on two grounds; **first**, the letter of administration was fraudulently obtained; and, **second**, respondent and other heirs mismanaged the deceased estates to her detriment. And, the first appellate court, having been satisfied that the procedure leading to revocation of letters of administration granted to the respondent was not followed, revised the said decision, and consequently quashed and set aside the same. Therefore, the first appellate court didn't revoke the letters of administration granted to the appellant but quashed the entire proceedings and the decision of the trial court dated 13/07/2020.

In responding to the argument made in respect of the third ground of appeal, the counsel submitted that no notice was issued to the respondent before the impugned revocation. And citation in Uhuru Newspaper was, by itself, improper on ground that the probate proceedings in the trial Court was not a fresh case that would require citation but proceedings for revocation of the letters of administration granted to the respondent. That the trial court acted on affidavit sworn by the appellant bearing untrue

statement in that the beneficiaries of the deceased estate were not within the reach of the appellant whereas to the contrary all beneficiaries are living and working for gain in Dar es Salaam and the appellant is aware of their residence. The counsel opined that the first appellate court was right to find that affidavit of service should have been sworn by the court process server.

With regard to the fifth ground of appeal, the counsel submitted that the respondent herein was legally granted letters of administration. If that was not the case, the appellant herein wouldn't have initiated the proceedings in Probate and Administration Cause No. 151 of 1997 for revocation of letters of administration granted to the respondent herein. The counsel asserted that the decision of the trial court dated 13/07/2020, speak volumes of this fact.

Lastly, in replying to the sixth ground of appeal, the counsel submitted that, the application before the first appellate court was for revision of the proceedings and decision dated 13/07/2020 in Probate and Administration Cause No. 151 of 1997. And based on parties' submissions, the first appellate court was satisfied that the procedure for revocation of letters of administration was not followed. Therefore, there was no new issue

raised by the first appellate court. Hence, the appellant was not denied right to be heard. This is all about the submission of the parties herein.

The issue for determination is whether the appeal herein is merited.

In resolving the issue raised herein above, I am bent to delve into the grounds of appeal commencing with the 1st ground. It is alleged that the trial magistrate had no jurisdiction to entertain the application for revocation of the letters of administration granted to the appellant. From the outset, I find it pertinent to make it clear that the respondent filed an application for revision in the first appellate court in that the court be pleased to call for and examine the records of the trial court in Probate and Administration Cause No. 151 of 1997 in order to satisfy itself to the correctness, legality and the propriety of the procedure, proceedings and decision thereon.

The revision power of the first appellate court is enjoined by the provisions of section 22(1) of the MCA which I find it fit to reproduce verbatim as under:

"A district court may call for and examine the record of any proceedings in the primary court established for the district for which it is itself established, and may examine the records and registers thereof, for the purposes of satisfying itself as to the

correctness, legality or propriety of any decision or order of the primary court, and as to the regularity of any proceedings therein, and may revise any such proceedings."

The first appellate court rightly exercised this power and reached a conclusion that the decision and orders of the trial court were in contravention of procedural law. Consequently, the decision and orders entered by the trial court were quashed and set aside. Therefore, I subscribe to the submission by the respondent's counsel in that the first appellate court was not invited to revoke the letters of administration of the deceased estate granted to the respondent but to revise and satisfy itself as to the correctness, legality and propriety of procedure, proceedings and the decision reached thereof. Therefore, the first appellate court acted within its jurisdiction. I find the 1st ground of appeal devoid of substance.

The 3rd ground of appeal avers that the learned Magistrate erred for concluding that the respondent was not duly served with the notice for appearance in court whereas the notice to the general public in respect of the probate proceedings commenced in the trial court was duly published in Uhuru newspaper. I have gone through the record of appeal herein. It is uncontroverted fact that, based on the nature of an

application lodged by the appellant in the trial court, the appellant sought to revoke the letters of administration earlier granted to the respondent. Further, the record of the trial court depicts that the first mention of the case was on 27/05/2020 whereas the citation of the case patently indicate that the proceedings were initiated in the Probate and Administration Cause No. 151 of 1997. It doesn't require farther inquiry to arrive to the conclusion that the application made by the respondent herein was initiated in the existing probate proceedings registered in 1997. Hence, the case before the trial court was not a fresh probate proceeding for grant of letters of administration of the deceased estate. And the appellant could not have been appointed to administer the deceased estate without the revocation of the earlier appointment.

The trial court is enjoined with power, under the provision of item 2 (c) of Part 1 of the 5th Schedule to the MCA to revoke any appointment of an administrator for a good and sufficient cause and require the surrender of any document evidencing his appointment. However, the trial court was obliged to ensure that the respondent herein was summoned to show cause why the granted letters of administration issued to him should not be revoked. It was unprocedural on part of the trial court to admit the affidavit of the appellant purporting to establish the fact that the

respondent and other beneficiaries were out of reach. The fact that it was contended by the respondent in the first appellate court that the respondent and all the beneficiaries of the deceased estate reside in Dar es Salaam, farther cast doubt on the truthfulness of the facts deposed by the appellant in moving the trial court to entertain the application *ex parte*. I purchase wholesale the opinion of the first appellate court in that the affidavit of service should have been sworn by the process server who was not interested in the case. I therefore, join hands with the respondent's counsel in that the proceedings initiated by the appellant was not fresh probate proceedings requiring a mere citation to the general public through publication in the newspaper. It follows that the respondent was denied the right to be heard before his appointment as the administrator of the deceased estate was revoked.

It is now a trite law that denial of the right to be heard in any proceeding would vitiate the proceedings. In the case of **Dishon John Mtaita vs The Director of Public Prosecution**, Criminal Appeal No. 132 of 2004 (unreported) cited in the case of **EX. MT 66807 SGT George Kwisema & Two Others vs Republic**, (Criminal Appeal 127 of 2020) [2023] TZCA 95 whereas it was held:

"The right of a party to be heard before an 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 decision would have been reached had the party been heard because the violation is considered to be a breach of the principles of natural justice."

Subject to the above discussion, I find no fault in the decision of the first appellate court in nullifying the proceedings and decision entered by the trial court without affording opportunity to the respondent to show cause why his appointment wouldn't be revoked. The 3rd ground of appeal, likewise, is found bereft of substance.

The discussion of the 1st and 3rd grounds of appeal, likewise, disposes the 5th and 6th grounds of appeal. I find it needless to further delve into the same.

Before I pen down, I find it pertinent to address one pertinent issue. The first appellate court, having nullified the proceedings, decision and order entered by the trial court, entered an order as thus:

"I direct the appointed administrator to file proper accounts and exhibit as per Form No. V and VI in Kariakoo Primary court within three months from the date of pronouncement of this ruling, which will show

proper distribution of properties of the deceased to heirs."

It should be born in mind that, in lodging her application for revocation of the letters granted to the respondent, it was alleged that the respondent mismanaged the deceased estate apart from failure to distribute the estate to the lawful heirs. The respondent had been appointed to administer the deceased estate for the past 22 years before the appellant sought revocation of his appointment. The respondent was obliged to file final account and close the probate proceedings within six months from the date of grant of the letters to administration. Allegedly, he failed in this respect. The order of the first appellate court purports to have extended time in which the respondent would file the inventory and final account, is improper in the circumstances of the case. I am of the settled view that, following the grave allegation made by the appellant, the trial court is obliged to hear the complaint *inter-parte* and decide whether the respondent is still the fit person to administer the estate before the respondent is ordered to file final account and close the probate proceedings.

For the foregoing reasons, I find the appeal herein devoid of merit. The appeal is hereby dismissed on its entirety. For clarity, I hereby enter orders as hereunder:

1. The decision of the first appellate court nullifying the proceedings and orders entered by the court of first instance purporting to appoint the appellant as administrator of the deceased estate is hereby upheld.
2. The order directing the respondent to file proper accounts and exhibit as per Form No. V and VI within three months from the date of pronouncement of the ruling of the first appellate court is hereby vacated.
3. The court of first instance (Kariakoo Primary court) is hereby ordered to expedite the hearing the application for revocation of the respondent appointment *inter-parte* and make necessary orders for the interest of beneficiaries.

DATED at DAR ES SALAAM this 10th July, 2023.



A handwritten signature in blue ink, appearing to be 'O. F. BWEGOGHE', is written over a circular stamp.

O. F. BWEGOGHE

JUDGE