

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

CIVIL REVISION NO. 01 OF 2023

(Originating from Probate and Administration Cause 04/2015 of the Primary Court at
Emaoi and District Court Order issued on 19/9/2022)

**SOLOMON SAITEU (A legal Representative of
the estate of the late Saiteu Lengaram)APPLICANT**

VERSUS

LOISHIYE LENGARAMU 1ST RESPONDENT
NAISUJAKI SAITEU 2ND RESPONDENT
PINIEL SAITEU 3RD RESPONDENT
JAPHET SAITEU 4TH RESPONDENT
LEONARD SAITEU 5TH RESPONDENT
NENGORORA SAITEU 6TH RESPONDENT

RULING

14th November & 21st December, 2023

KAMUZORA, J.

This is an application for revision filed in which the applicant herein prays for this court to exercise its revisionary powers and revise the order of the district court in of Arumeru issued on 19/09/2022 directing Emaoi Primary court to reopen the Probate and Administration Cause No. 4/2015

and revoke the appointment of the applicant herein. The application was brought under Section 43 (3) and 44(1) (b) of Magistrates Court Act Cap. 11 R.E 2019 for the following orders: -

- a) That, the High Court be pleased to exercise its powers of revision over the order of Arumeru District Court which was issued on 19/9/2022 directed Emaoi Primary Court to reopen Probate Administration Cause No 4/2015 and revoke appointment of applicant on 6th December, 2022.*
- b) That, trial court was functus official as the matter was closed on 2015.*
- c) That, the respondents have no locus stand to challenge applicant appointment after expired 8 years hence the matter is time barred.*
- d) That, revocation of the applicant is bad in law as the District Court did not provide applicant Constitutional Right of being heard before the court at the time when it had ordered calling and examination of proceedings of the trial court and directing the trial court to call the applicant to complete again form No. V and VI which he was already completed on 2015.*
- e) The costs of this application be granted.*

When the matter was called for hearing, the Mr. Lengai Loita appeared for the applicant while the respondents appeared in person. Parties opted to argued the application by way of written submissions and they both complied to the submissions schedule.

Before arguing the application, the applicant's counsel raised a concern about competence of the counter affidavit filed by the respondents. He contended that the same is incurably defective because all respondents did not sign their counter affidavit before the Commission for Oaths and respondent signed the counter affidavit on behalf of other respondents which is against Order XIX Rule 3(1) of the Civil Procedure Code CAP. 33 R.E 2019. He thus prays this honorable court to be pleased to struck out the same with costs and proceed to determine this Civil Revision ex-parte. The respondent on the other hand challenged the competence of revision application on ground that the grounds raised for revision could be well dealt in appeal and not revision.

I do not intend to waste much time on these two issued raised by parties. The same were raised against the pleadings filed before this court which however, no one tried to challenge their competence before the revision application was scheduled for hearing. If either of the party considered that there were irregularities in the pleadings filed before this court, the proper procedure was to raise objection against the same before the revision application could be scheduled for hearing. Since the raised issues does not touch jurisdiction of the court or competency of the matter

in terms of time limitation, this court being guided by overriding objective principle find it necessary to focus on substantive justice and determine the application on merit.

Arguing in support of application the counsel for the applicant adopted the affidavit in support of chamber application and submitted for grounds (a) & (d) collectively that on 19th September 2022 the district court examined records of proceedings of Probate and Administration Cause No. 4 of 2015 and directed Emaoi Primary Court to reopen Probate and Administration Cause which was closed on 1st July 2015 and the Emaoi Primary and directed the primary court to revoke the appointment of applicant. To him, such order is bad in law as the District Court did not provide the applicant the Constitutional Right of being heard. He added that the district court erred in law and in fact by not ordering Arumeru District Court registry to open a new file of the District Court of Arumeru at Arumeru of 2022 and issue summonses to the parties to appear before the court and address it on the matter of revision before the court issued an order on 19/9/2022 to Emaoi Primary Court to re-open Probate and Administration Cause No. 4 of 2015.

From the records, I discovered that the order challenged herein was made by the resident magistrate in charge of the district on 19/09/2022

using the primary court file. The said order read: -

"Baada ya kupitia jalada hili ni dhahiri kuwa mirathi ilifungwa kwa amri ya Mh. J.K Mushi ya tarehe 01/17/2015 baada ya kupokea taarifa ya mgao wa mali za marehemu. Mgao huo ulipokelewa pasipo kujazwa fomu na V na VI wala kuwasilishwa katika mahakama. Hivyo basi Amri hiyo ya kufunga mirathi ilitolewa kinyume cha sheria kwa mtazamo wangu kwa kutumia mamlaka na nguvu chini ya kifungu cha 22 (2) cha sheria za mahakama za mahakimu (sura ya 11 marejeo ya 2019) nabatilisha amri ya kuondoa mwenendo wa tarehe 01/07/2015 mbele ya Mah. J.K. Mushi- PCM na kuamuru shauri kuendelea kuanzia hatua ya msimamizi kuwasilisha fomu Na. V na VI mbele ya mahakama. Aidha naagiza shauri lisikilizwe kwa haraka ili mirathi hiyo ifungwe haraka kwa sababu ni shauri la muda mrefu. Imeamuliwa hivyo."

From the above order, I agree with the applicant that there is procedural irregularities committed by the resident magistrate in-charge of the district court. In my view, there are three issues; one, making revisional order in the primary court file, two, making revisional order without hearing parties to the case and three, making revisional order after expiration of statutory period.

On the first issue, the magistrate in-charged entered coram in the primary court file and excised revisional powers under section 22 (2) of the

MCA. I understand that the district court has revisional powers over the proceedings and decision of the primary court under section 22 of the MCA.

For easy of reference, the said provision is reproduced here under: -

22.-(1) 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.

(2) In the exercise of its revisional jurisdiction, a district court shall have all the powers conferred upon a district court in the exercise of its appellate jurisdiction including the power to substitute a conviction, or a conviction and sentence, for an acquittal; and the provisions of paragraph (b) of subsection (1) of section 21 shall apply in relation to an order quashing proceedings and ordering a rehearing which is made in the exercise of a district court's revisional jurisdiction as they apply in relation to any such order made in the exercise of its appellate jurisdiction.

(3) In addition to the provisions of subsection (2) of this section, no order shall be made in the exercise of the court's revisional jurisdiction in any proceeding of a civil nature increasing any sum awarded, or altering the rights of any party to his detriment (other than an order quashing proceedings in a lower court or an order reducing any award

in excess of the jurisdiction or powers of the lower court to the extent necessary to make it conform thereto) unless such party has been given an opportunity of being heard.

(4) No proceedings shall be revised under this section after the expiration of twelve months from the termination of such proceedings in the primary court and no proceedings shall be further revised under this section in respect of any matter arising thereon which has previously been the subject of a revisional order under this section.

(5) NA.

In considering the above provision, and as matter of practice, revisional order cannot be made by the superior court in the lower court's case file. If the magistrate thought that there was a need for revision suo motto she was bound to direct the registration of revision application before the district court and use it to revise the decision of the lower court. Making an order in the primary court case file was an incurable defect vitiating the order for revision.

On the second issue, the law is clear that parties must be accorded right to be heard before any order is made as so required by subsection 3 of section 22 of the MCA. That position has been stressed by this court and the court of appeal in number of cases. See, the court of appeal decision in Civil Appeal No. 61 of 2016 **David Nzaligo Vs. National Microfinance**

Bank PLC and Application No. 133 of 2002, **Abbas Sherally Vs Abdul Sultan Haji Mohamed Fazalboy**. It is now settled that right to be heard is paramount thus, where the court raise any issue suo motto as it was the matter in this case, it is bound to call for parties to address it before making decision affecting parties. This is in conformity to the principle of fair hearing that no decision shall be made before parties are heard on the same. Giving an order without calling parties was procedural irregularities and consequently, affect the decision made therefrom. In the case of **John Morris Mpaki Vs. NBC Ltd and Ngalagila Ngonyani**, Civil Appeal No. 95 of 2013 (unreported), the court of appeal held that;

"... The law that no person shall be condemned unheard is legendary. It is trite law that any decision affecting the rights or interests of any person arrived at without hearing the affected party is a nullity, even if the same decision would have been arrived at had the affected party been heard."

On the third issue, I also observed that the revision order was made against the decision of the primary court which closed the probate proceedings on 01/07/2015. Revision under section 22 cannot be done after the expiration of twelve months from the termination of the proceedings in the primary court. However, the revision order was issued under section 22


(2) on 19/09/2022 by Hon Kazema, the resident Magistrate In-charge of the district court without considering that the time for revision under that provision had already lapsed.

In that regard, the nature of this matter could be well attended through revision application as opposed to the respondent's proposition that the applicant could appeal against the order of the magistrate in-charge. It is without doubt that there were irregularities in the proceedings which could be cured by revision.

I therefore find that there was error material to the merits of the case involving injustice and being guided by the provision of section 44 (1)(b), I invoke revision powers of the High Court and nullify the order issued by the magistrate in-charge on 19/09/2022. The subsequent proceedings and ruling of the primary court arising after that order are also nullified. The revision application is therefore allowed with costs.

DATED at ARUSHA this 21st Day of December, 2023.




D.C. KAMUZORA
JUDGE

