IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

TEMEKE HIGH COURT SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 1421 OF 2024

(Arising from the judgment and decree of the District Court of Temeke at One Stop Judicial Centre in civil revision No.03 of 2023 and originating from the Primary Court at One Stop Judicial Center in Probate Cause No.949 of 2021)

ASGHER MOHAMED KERMALI.....APPELLANT

VERSUS

SABIRABANU MOHAMED KERMALI .....RESPONDENT

(Administratrix of the estate of the late Mohamed Kermali)

JUDGMENT

11/03/2024 & 04/04/2024.

SARWATT, J.;

The appellant herein challenges the decision of the District Court of Temeke at One Stop Judicial Center with the following seven grounds of appeal;

1. *That the honourable Magistrate erred in law and fact by not*

affording the parties the right to be heard when he raised a point of law suo mottu and went to determine itself.

2. *That honourable Magistrate erred in law and, in fact, by stating that the proper forum of challenging the probate cause in the Primary Court is only by filing the civil suit and not revision.*

3. *That honourable Magistrate erred in law and, in fact, by not dealing with the issues raised in the preferred civil revision no 3 of 2023 between the parties whilst the Court was moved to revise the probate case in the Primary Court with more than five grounds of revision.*

4. *That the honourable Magistrate erred in law and, in fact, by not deciding civil revision no 3 of 2023 on merits, of which this denied the applicant his right to be heard.*

5. *That the honourable Magistrate erred in law and, in fact, by not calling upon the Primary Court case file and examining itself as to its correctness, legality, and propriety in probate and administration cause no 949 of 2021 of the Primary Court whilst the chamber application of the applicant requested for such*

supervision of Court.

6. *The honourable Magistrate erred in law and, in fact, by not quashing the proceedings done in Primary Court, which did accept the distribution of the deceased property without following the Islamic Law and the Holy Quran, which is an issue of jurisdiction of the Court.*

7. *That the honourable Magistrate erred in law and, in fact, on the issue of not using Islamic Law in the Primary Court and confirmed the same while entertaining the civil revision.*

A brief narration of facts arising from this case before the Primary Court and the District Court is necessary to understand this appeal better. The appellant (Asgher Mohamed Kermali) and respondent (Sabirabanu Mohamed Kermali) are a widow and a stepson who are amoung the sole heirs of the late Mohamed Kermali. The deceased died intestate on 29th August 2021. After her husband's death, the respondent herein, through probate case No. 949/2021, applied before the Primary Court at Ons Stop Judicial Center to be appointed administratrix of the estate. Her application went unchallenged. Thus, on 23rd December 2021, she was officially

appointed to administer the estate of her late husband, Mohamed Kermali. Following her appointment, she distributed the estate to all heirs, including the appellant. This distribution did not amuse the appellant, as it seemed unfair to him. After the closure of the probate case, the appellant, through his advocate Paren Borhara, filed a caveat at the trial Court claiming against the respondent for not involving him in the estate distribution. However, on 23rd November 2022, when the matter was scheduled for hearing, the appellant withdrew the said caveat.

Later on, the appellant applied for revision before the District Court of Temeke at One Stop Centre, alleging, among other things, that the appointment of the respondent as administratrix of his late father, Mohamed Kermali, had distributed the deceased properties while he was outside the country and that he was not involved in the process. After hearing the complaint, the District Court did not revise the said probate cause no 949/2021 for the reason that thee same was officially closed by the trial Court.

Dissatisfied with the decision, the appellant appealed to this Court. At the appeal hearing, the appellant was represented by Eric Aggrey Mwanry, the learned advocate, while the respondent enjoyed the service of the learned

advocate, Tatu Mzee Ali. Both counsels agreed that the the appeal be heard through written submissions.

Submitting in support of the 1st, 2nd, 3rd, 4th, and 5th grounds collectively, the appellant's counsel argued that while at the District Court, both parties were prayed for, and they were granted for the hearing of the application for revision to proceed by way of written submissions. The counsel went on to submit that the District Court did not make its findings to each preferred grounds of revision. It raised by its own the issue of jurisdiction and concluded the case without considering the grounds for revision. According to the appellant counsel, this amounts to not hearing the parties.

The counsel further argued that the District Court, by so doing, contravened article 13 (6)(a) of the Constitution of the United Republic of Tanzania, which provides inter alia for a fair hearing of the parties to the cases before the Court of Law. To support his assertion, the counsel cited the Court of Appeal case of **Charles Christopher Humphrey Kombe t/a Kombe Building materials v Kinondoni Municipal Council** Civil Appeal No. 19 of 2019 and **Charles Christopher Humphrey Kombe t/a Kombe Building materials v Kinondoni Municipal Council Civil Appeal No. 19 of 2019 and Wegesa Joseph M. Nyanda Vs.**

On the 6th and 7th grounds, the appellant's counsel submitted that since the Primary Court accepted the distribution of the deceased properties, which did not abide by Islamic Law, the District Court had sufficient reasons to quash the proceedings of the Primary Court.

In his reply to oppose the appeal, the counsel for the respondent, on the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal, submitted that the District Court was moved to examine the record and proceedings of the Primary Court and revise them, something which the District Court did.

The counsel further submitted that the District Court never framed the new issue. According to the respondent counsel, it was proper for the District Court to find that upon closure of the probate case by the Primary Court the case cannot be reopened.

As for the 6th and 7th grounds, the counsel submitted that the appellant's submission and the affidavit presented in the District Court do not show the decision or order made by the Primary Court that can be revised regarding the distribution of the deceased estate. The counsel added since the appellant's grievance is the mode of the distribution of the deceased

estate, which the administratrix has effected, the District Court has no jurisdiction to revise it as per the directives of section 22(1) of Magistrates Court's Act as the same empower the District Court to revise the decision of the Primary Court and not of the administrator as in this case. The counsel cited the Court of Appeal case of **France Michael Nyoni Vs. Republic criminal appeal No. 505 of 2020** to give weight to his argument.

In her rejoinder, the counsel for the appellant insisted that the District Court finalized the case through the issue of lacking jurisdiction, which it raised *suo mottu*. By so doing, the parties were not accorded the right to be heard and denied justice.

After having gone through all parties' submissions, I'm tasked to determine if these grounds of appeal have merit. On the 1st, 2nd, 3rd, 4th, and 5th grounds of appeal, the appellant is challenging the District Court for not giving the parties the right to be heard while determining the revision case, whereas, on the 6th and 7th grounds, he challenges the mode of distribution of the deceased estate adopted by the administratrix.

It is also on record that the appellant applied for revision before the District

Court after the Primary Court's official closure of the said probate case. The District Court, upon hearing both parties through written submissions, finalized the case on the basis that it has no jurisdiction to revise the proceedings of the closed probate case. According to the record, the issue of jurisdiction was not raised by any party during the application hearing. Rather, in the course of composing judgment, the presiding Magistrate raised it *suo mottu*. On page 4 of the typed judgment, where the Court said,

> *"After having recapped the submissions from both parties, the ball is now in my hand to unveil the hidden truth on whether this Court can revise the order of the trial Court."*

It is a cardinal principle that, before a decision that adversely affects a party is given, he should be given the opportunity to be heard. It is apparent that the issue of jurisdiction has never been raised by parties during the hearing the application before the District Court. In the circumstances, it goes without saying that the parties did not get the opportunity to submit it. In a number of cases, the Court of Appeal of Tanzania has provided the consequences of deciding cases without giving parties their right to be heard. In the case of **CHARLES CHRISTOPHER**

KOMBE vs KINONDONI MUNICIPAL COUNCIL, Civil appeal no. 81 of 2017 at Dar es Salaam, it quoted its decision in the case of **DEO SHIRIMA & 2 OTHERS vs SCANDAVIAN EXPRESS SERVICES LIMITED,** civil application no. 34 of 2008 (unreported), in which it was observed;

> *"The law that no person shall be condemned unheard is now legendary. It is trite law that any decision that affects 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. This principle of law of respectable antiquity needs no authority to prop it up. It is common Knowledge."*

In the present case, based on the above directives, I agree with the appellant's counsel that it was not fair for the District Court to decide the said application based on the issue that the parties were not accorded the right to be heard. In the said case of **DEO SHIRIMA & 2 OTHERS (Supra),** it was also directed;

> *It is established law that any judicial order made in violation of any of and* ***must always be quashed even if it is made in***

good faith." (emphasis is mine).

Since the District Court's directives violate the right to be heard, which is of the rule of natural justice, its decision cannot stand.

Since grounds 1,2, 3, 4, and 5 are sufficient to dispose of the appeal, I find no reason to discuss the other grounds. In the event and for the above reasons, I hereby quash the whole decision made by the District Court and order that the record be remitted back to the said Court before the same presiding Magistrate for rehearing the parties on the issue of jurisdiction and composing the fresh ruling.

It is so ordered.

Dated at **Dar es Salaam** this 08th day of April, 2024.

HIGH COURT OF TANZANIA

S. S. SARWATT

JUDGE