

IN THE HIGH COURT OF TANZANIA
TEMEKE HIGH COURT SUB-REGISTRY
(ONE STOP JUDICIAL CENTER)
AT TEMEKE
CIVIL REVISION NO. 1 OF 2021

*(Originating from the Ruling of the District Court of Kinondoni at Kinondoni delivered on 30th day of July
by Hon. L. SILAYO RM in Probate and Administration Cause No. 133 of 2021).*

ANNATH ATHUMAN MASEKO.....APPLICANT

VERSUS

LILIAN KIRUNDWA RAJABU as Administrator of Estate of the late
JOEL SIMBO KIRUNDWA.....RESPONDENT

Date of Last order; 8th November, 2021

Date of Ruling; 18th November, 2021

RULING

N.R. MWASEBA, J.

Annath Athuman Maseko who for the purpose of this application shall be referred to as "applicant" filed an application supported by an affidavit of the applicant under certificate of urgency against **Lillian Kirundwa Rajabu** who for the purpose of this application shall be referred to as

“respondent” seeking this court to be pleased to grant orders stated, *inter-alia*:

- (a) To call for records of proceedings, examine, revise and quash the ruling and the drawn order of the district court of Kinondoni at Kinondoni delivered by SILAYO.L.-RM on 30th July, 2021 in Probate and Administration Cause No. 133 of 2021.
- (b) To make revision on the proceedings and ruling of the district court at Kinondoni for the purpose of satisfying itself as to the correctness, legality or propriety of the ruling and drawn order dated 30th July, 2021.
- (c) To order that, the lower court had no pecuniary jurisdiction to determine and grant the administration over the deceased’s estate whose value is above 100 Million.
- (d) To order that, the conduct of the probate cause towards the appointment of the respondent as administrator without involving the widow (deceased’s wife) was unlawful, making the grant of letters of administration illegal.
- (e) To order that the purported minutes of the family meeting held on 2nd May, 2021 at the residence of Mzee Eliakim Kimaro in Kawe was unlawful as the deceased’s wife, the applicant was not involved.
- (f) To order that the conduct of the respondent in impersonating herself as administrator since 14th, March, 2021 was unlawful and illegal in the eyes of the law hence subject to revocation.
- (g) To order the respondent to rescind from tempering with the deceased’s property until determination of this application.

- (h) To order the respondent to surrender the death certificate of one Joel Simbo Kirundwa to the applicant.
- (i) To order for revocation the respondent from being an administrator of the estate of the deceased Joel Simbo Kirundwa.
- (j) An order from this court appointing the applicant (deceased's wife) an administratrix of estate of her deceased husband.
- (k) Any other relief(s) the court may deem fit and just to grant.
- (l) Costs be provided for.

A brief summary statement from the applicant's affidavit is that, the applicant is the wife of the deceased person one Joel Simbo Kirundwa having cohabited and lived with the deceased as husband and wife since 1996 up to his death on 14th March, 2021. The applicant further stated that the deceased died intestate on 14th March, 2021 at Rabininsia Hospital, Tegeta, Kinondoni within the city and region of Dar es Salaam. The applicant went ahead attaching the copy of certificate of death and marked it as **"ANNEXTURE-AAM-1"**

It is reflected under the affidavit of the applicant that, the applicant met the deceased way back in 1995 while she was dealing with importation of goods including cars and tyres from China and that, the deceased assisted her as a driver.

The applicant stated as seen under paragraph "4" of the affidavit, in 1996, the two had fallen in love. In the year 2000 when the applicant fell sick, she made the deceased as one of her signatories, business partner and one of the directors in certain companies. Sometimes in 2001 and 2002,

she obtained a loan worth about Tanzania Shillings Two Hundred Million (200,000,000/=) from Tanzania Investment Bank (TIB) to boost her business in several companies. However, before executing her plans, the deceased withdrew the money from the Bank Account and purchased various properties in Arusha such as a house, motor vehicles (Toyota pick-up and Nissan X-Trail) without the applicant's consent.

The applicant further stated, following the incidence of the deceased withdrawing the borrowed money from the bank account, in 2004, the applicant excluded the deceased from being one of the signatories. The applicant being a business woman, her business success is traced way back in 1995 to date. She stated to have been obtaining loans from various financial institutions including, Tanzania Investment Bank, Amana Bank, NMB, CRDB, Equity Bank and Treasury through Tanzania- Japan Import Support. She wisely utilized the obtained loans and strengthened her businesses to the extent of opening other companies such as Room Furniture Centre Company Limited, purchased some motor vehicles, and plots in Dar es Salaam and Dodoma. The applicant went ahead stating under paragraph 8 that, in October, 2020, her husband fell sick and his health deteriorated. She took him to various hospital including CCBRT, Muhimbili and Rabininsia and took care of him at her own costs. In November, 2020, the applicant and her children decided to seek further treatment from abroad. To her surprise, the deceased's relatives came at her home in Msasani and forcefully took him to Kigamboni and later to Kawe. Thereafter, they were taking him to various churches for prayers while the relatives including the respondent kept on demanding the

deceased to disclose his wealth/properties but in vain. Later, the deceased returned to his matrimonial home in Msasani and the applicant took her husband to CCBRT. After being attended at CCBRT he was referred to Rabininsia Hospital.

While at Rabininsia, it was recommended that because the tumor was stationed at a bad position the deceased could not be operated but rather, he was to go back to CCBRT for further chemotherapy. They later went back to Rabininsia for check- up and were recommended for CT-Scan at Muhimbili Hospital in which the results for the CT-Scan revealed no improvement of the tumor. Basing on the worse condition the patient had, the applicant decided to look for visa with a view to take the patient to India for further treatment. Before the flight to India could materialize the health condition of the patient deteriorated and they decided to take him back to Rabininsia hospital, and unfortunately, he passed away.

The applicant further stated that the deceased was buried at his home village in Hai District, Kilimanjaro Region. While planning to convene a clan/family meeting for the purpose of nominating the administrator of the deceased's estate in early August, 2021, the respondent went to the applicant's home in Msasani requiring the applicant to give her the list of deceased's properties. The respondent claimed that she was appointed as the administrator by Kinondoni District Court on 30th July, 2021. The applicant attached the copy of letters of administration and annexed it as **"ANNEXTURE AAM-2"**. From the foregoing factual revelations, the applicant believes that, the letters of administration for the said deceased's estate have been procured illegally. The applicant decided to contact and

consult one Felix Makene an advocate who knew well the deceased and the applicant's family at large. The advocate wrote a letter for perusal of the court's case file. The applicant had further stated that, the perusal of the case file by her advocate revealed that the letters of administration of the estate of the deceased one Joel Simbo Kirundwa was procured illegally and actuated by fraudulent presentation or utterance of false information by the respondent. The false information includes the following:

- (a) The respondent uttered that the deceased had no wife rather a girlfriend who also knew there was a probate and was called but refused to come and allowed the respondent to proceed.
- (b) The respondent on 2nd May, 2021 uttered false information to the purported family meeting that, the applicant failed to attend for reason that, she was sick.
- (c) The respondent uttered false information that, she was a resident of Ukwamani, Kawe area No. 7 and her Ten cell leader is Kitwana Mwinchande, and Mtaa Government leader is Hamisi R. Chilemba.
- (d) During the hearing as seen in the proceedings of the court, the respondent took oath stating to live in Kigamboni.
- (e) The respondent previously prior to the purported granted letters of administration impersonated herself as an administrator of the estate of the deceased and managed to report to the police Station on 14th March, 2021 (the same date of the death of the deceased) about the loss of the deceased's properties. The applicant had attached copies of the proceedings, ruling, "Uthibitisho wa Mkazi wa Mtaa", Police loss report referenced No. DAR/SEL/RB/382481/2021 reported on

14th March, 2021, Minutes of Family Meeting dated 2nd May, 2021 to form part of her affidavit collectively and marked them as **"ANNEXTURE AAM-4"**.

The applicant concludes that the respondent had evil motives towards the deceased's estate. The applicant had noticed the respondent to have visited TIB Rasilimali Limited where she claimed and reported the loss of deceased's original certificates of shares falling in the estate of the deceased, the fact which is not true. Through the service of Kings Law Chambers the applicant wrote a letter explaining the ill motives of the respondent and requested the Director not to proceed with any transactions in respect of those shares. The applicant had attached the copy of the letter by Kings Law Chambers and marked it as **"ANNEXTURE AAM-5"**.

The applicant further stated that the respondent visited CRDB Bank as well demanding for a title deed which was kept as security for loan but failed. However, the respondent managed to collect Tanzanian Shillings Nine Million (9,000,000/=) as rent from the tenant in the house located in Mbezi-Beach claiming to meet children's amenities. The applicant therefore urges for the court's intervention to protect her interest.

In responding to the affidavit by the applicant, the respondent stated to be the administrator of the late Joel Simbo Kirundwa's estate who is her biological brother and that, the applicant has never been a wife of Joel Simbo Kirundwa but rather the applicant was married to one Ignatus

Maseko. The respondent attached a copy of the declaration made by Ignatus Maseko and marked it as **annexture LSK 1**.

The respondent further stated that the marriage between Ignatus Maseko and the applicant herein was blessed with 4 issues, namely Fadhila Maseko, Elizabeth Maseko, Pascal Maseko and Stella Maseko and that, the applicant still retains the last name that is Maseko.

The respondent seems to strongly dispute the contents of paragraph 5, 6 and 7 of the applicant's affidavit but clearly states that, the plots mentioned and other landed properties in Dar es Salaam, Dodoma and other mentioned companies belong to both the applicant herein and the deceased.

The respondent at paragraph 7 of her counter affidavit had noted the contents of paragraph 8, 9, 10 and 11 only in respect of deceased's sickness and denies the fact that, the deceased had been living in Msasani with the applicant but lived in Msasani with his girlfriend one Restituta William Mally and that, when the deceased had become seriously sick, he decided to shift from Msasani to Kawe and later to Kigamboni for the purpose of living close with his relatives who took care of him up to his demise.

The respondent further had noted the contents of paragraph 12 and 13 of the affidavit by the applicant and accepts only on the deceased's death. She stated that, the applicant never attended the burial ceremony and that, she invited the applicant to attend the family meeting but failed to attend claiming to be sick.

The respondent stated that the contents of paragraph 14 and 15 of the applicant's affidavit stand to be disputed and further states that the letters of administration granted to her were lawfully procured because all the procedures for the appointment and grant were followed.

The respondent stated that, she resides in both Kigamboni and Kawe as reflected in paragraph 15 (iii) and (iv) and that, the applicant had confirmed at paragraph 9 of her affidavit that, the deceased was taken both to Kigamboni and Kawe. The respondent states that, she reported to the police about the loss on 3rd August, 2021, the date which the Inspector General of Police approved the loss report by signing it. She stated that the details in the loss report indicate that, the deceased died on 14th March, 2021 and not the date of the loss report.

The respondent said, she only approached TIB Raslimali Limited and CRDB as the administrator of the estate for collection of the deceased's properties for the benefits of the deceased's children one Juliana Joel Simbo, Joan Joel Simbo and Jesca Joel Simbo and any other beneficiary of the estate. The respondent attached copies of the birth certificates of the deceased's children and marked them as **Annexure LSK 2**. The respondent therefore prayed for the dismissal of the application by the applicant with costs.

That was exactly what transpired in the pleadings for both applicant and respondent. During oral hearing of the application, the applicant being represented by the learned counsel one Mr Felix Makene and Mr Mudhihir Magee learned counsel represented the respondent.

The counsel for the applicant submitted before the court, revealing the application to have been made under **S. 71(1) (a) and (3) of the Civil Procedure Code**, Cap. 33 R.E 2019 and any other enabling provisions. He contended that the application is supported by the applicant's affidavit of which the applicant prays for the court to adopt the contents contained in the affidavit to form part of the submission.

He informed the court that the applicant before the court is the deceased's wife having cohabited for over 25 years living together as husband and wife under the same roof and that, the parties have been known by the surrounding community as husband and wife till the death of the deceased. The counsel further submitted that the applicant seeks to be granted for the prayers under the revision due to the reason that the grant of letters of administration by the respondent granted on 30th July, 2021 before the district court of Kinondoni looks as if it was unlawfully obtained because the applicant was not involved in the whole process related to the administration of the estate of the deceased one Joel Kirundwa Rajab who is the applicant's husband.

The counsel for the applicant raised three grounds for revision including: ***The first*** ground is based on lack of jurisdiction of the trial court which is Kinondoni District Court at Kinondoni.

He cited S. 2 of **the Probate and Administration of Estate Act**, Cap. 352 as amended by **the written Laws (Miscellaneous amendment) Act**, G.N No. 2 of 2016 which provides for the pecuniary jurisdiction of the District Court on probate matters in respect of small estates to be not

exceeding 100 Million Tanzanian Shillings. Going through the respondents' petition at the District Court of Kinondoni, the respondent with intent to defraud managed to under-price the value of the deceased's estate in respect of the landed property located at plot No. 609 Block G Mbezi-Beach by valuing the same at 40 Million Tanzanian Shillings. He said, under common sense the said house being situated at a prime area and for it being a storey building with one flat, well-furnished and the same being rented by both the deceased and the applicant, cannot be equated to 40 Million Tanzanian Shillings without being justified by the valuer. The counsel stated that the said house is estimated by the applicant to be above 150 Million Tanzanian Shillings. The respondent also managed to value plot No. 90 block 20 located at Bunju at 20 Million Tanzanian Shillings.

The counsel further advocated; the respondent valued the plot located at Iyumbu new town center in Dodoma at a value of 32 Million Tanzanian Shillings which seems to be a total daylight lie intending to mislead the court. He said, the applicant and the deceased own an area of 10,000sqm in the same area of which @square meter was bought at a price of Tanzanian Shillings of 17,000/= which is well calculated and brings 170 Million Tanzanian Shillings. He stated that the respondent failed to give the value and number of shares owned by the deceased in Room Furniture Centre Limited.

From the foregoing, it was improper for the respondent to value the deceased's estate at 82 Million Tanzanian Shillings for the landed property at Mbezi-Beach, Bunju plot and Iyumbu plot while from the reality, the

properties listed exceed 100 Million Tanzanian Shillings, hence above the pecuniary jurisdiction of the district court of Kinondoni. He submitted that courts being creatures of the Constitution are entitled in law to adjudicate or determine matters which are vested in their jurisdiction.

The counsel cited the cases of **FARVEL MARTIRI NG'ONDA VS HERMAN MARTIRI NG'ONDA [1995] T.L.R 159** and **TANZANIA CHINA TEXTILE Ltd [2006] T.L.R NO. 70** in which the court of appeal of Tanzania said, the point on jurisdiction can be raised at any time or stage of the case.

The ***second ground*** is unlawful procurement of letters of administration dated 30th July, 2021 by the respondent. The counsel pointed out areas showing unlawfulness by the respondent. At the first note, the family of the deceased was not disclosed as required under **s. 56(1)(b)** of the **Probate and Administration of Estates Act**, Cap 352 R.E 2002 of which among the conditions in seeking the grant of the letters, the family, relatives and their respective residence must be disclosed. Going through the petition for letters of grant of administration in probate cause No. 133 of 2021 under paragraph 2 of the petition, the respondent wilfully with intent to defraud, mentioned **Juliana Joel Kirundwa, Joan Joel Kirundwa and Jesca Joel Kirundwa** as relatives of the deceased while they are the children of the deceased. He said, the ambit of the law recognizes the deceased's surviving children born out of different mothers and the children are still alive.

The counsel stated that the applicant had failed to understand the intention of the respondent to call the surviving children of the deceased as relatives of the deceased hence lawful beneficiaries of the deceased including the applicant. The counsel further contended, to the surprise of the applicant on 22nd October, 2021, the respondent filed a counter affidavit before the court acknowledging the previously stated and listed relatives of the deceased under paragraph 10 of the counter affidavit calling the so referred relatives as children of the deceased and managed this time around under the counter affidavit to attach birth certificates of the said children. The counsel posed a question before the court as to what was the intention of the respondent in failing to recognize Julian Joel Simbo, Joan Joel Simbo and Jesca Joel Simbo as surviving issues and why the birth certificates were not attached in the lower court.

The counsel further indicated another area of unlawfulness towards the acquisition of the letters of grant to be based on the fact that, the probate cause in the lower court was not backed by the original written and signed consent from the beneficiaries including the applicant. He said that the consent is a mandatory requirement towards compliance as a basic document to be attached or annexed to the petition for the grant of letters of administration as insisted under Rule 39(f) of the Probate Rules which provides for the mandatory requirement for the consent of heirs to be given.

The counsel further submitted before the court that the applicant noted that the respondent fraudulently filed consent before the district court of Kinondoni which was obtained from one Eliakim I. Kimaro, Ester I.

Kilungwa, Irene E. Kimaro, Adam Elimawinga, David Elimawinga, Henry Clemence, Lucy Clemence. Ega Kimaro, Anna A. Kirungwa, Aisia Masamaki, Jackson Lema and Denis Kweka.

He submitted, from the listed names purported to have given the consent that none is indicated to be an immediate heir as indicated in the counter affidavit. He said, another area where unlawfulness is noted is a fraudulently misrepresentation or utterance of false information in respect of the respondent's permanent address of place of abode. He said, the petition to obtain letters of administration of the deceased's estate goes hand in hand with the introduction letter from Mtaa government leadership where the petitioner/applicant resides.

He said, the respondent as clearly known by the applicant lives in Kigamboni however, in meeting her evil intentions the respondent fraudulently uttered false information to be living in Ukwamani Street in Kawe, the fact which is not true. He said, according to the proceedings in the lower trial court at Kinondoni, the respondent testified under oath that, she lives in Kinondoni while in her counter affidavit under paragraph 9 (iii) stated that, she lives in both premises in Kawe and Kigamboni which is not true.

Another sign for the unlawfulness of the respondent in the probate cause in the lower court is the fact of not involving the applicant who is a deceased's widow. Likewise, the act by the respondent to conduct the family meeting on 2nd May, 2021 in Kawe at Mzee Eliakimu Kimaro's residence who was also PW2 in the lower court was not justifiable as Mzee

Eliakim was not the one who applied for the grant of letters hence improper to conduct the family meeting at his residence. He said, the family meeting was supposed to be conducted at the deceased's home place at Msasani as clearly indicated at the 1st page of the typed ruling of Kinondoni District Court.

The counsel for the respondent said, since the applicant cohabited with the deceased and lived together as husband and wife for about 25 years and the fact that, the applicant took care of the deceased and incurred a lot of monetary and moral expenses, it would be wise if the family meeting would have been conducted at the deceased's place of fixed address of abode in the same premises the applicant lives to date. He contended, going through the respondent's counter affidavit before this court at paragraph 6, the respondent unequivocally admits that, the properties mentioned, companies, plots, landed properties in Dar es Salaam, Dodoma all belong to the applicant and the deceased. That being the case then, why the applicant was not involved in the family meeting? He contended, the applicant after perusal of the lower court record on the family meeting minutes at the front page where names of those who failed to attend the meeting are indicated and the applicant was indicated to be sick the fact which was not true.

He further said, the entire family minutes for the meeting do not indicate/show if Erick Simbo Kirundwa (the deceased's young brother) was present. The failure to include Erick Simbo Kirundwa was an indicator for the respondent to hide material information hence considered as a threat

to the respondent and other relatives because in all times, Erick Simbo Kirundwa has been supporting the applicant.

The final ground on the unlawfulness was the respondents' impersonation to the police in Dar es Salaam on 14th March, 2021 as administrator of the deceased's estate. He said, on 14th March, 2021 the respondent reported to the police for loss of some properties of the deceased reporting as administrator. He said, the deceased one Joel Kirundwa Rajabu died intestate. That the act by the respondent reporting to the police as administrator on the very date the deceased died raises questions including:

- (a) Did the death of the deceased occur concurrently with the appointment of the respondent as administrator?
- (b) Was the respondent appointed as administrator of the deceased estate before the death of the deceased?
- (c) If the respondent was previously appointed as administrator, does the law allow the same person to petition for letters of administration on the same estate?

The counsel invites the court to peruse the annexure reflected at paragraph 15 of the applicant's affidavit to grasp the ill motive of the respondent. The counsel informed the court that, the applicant was aware of the way the respondent had spent the proceeds of the estate on her own hence seeks the intervention of the court in particular under inherent powers of the court as reflected at **S. 95 of the Civil Procedure Code, Cap. 33 R.E 2019**. He said, since the respondent is misappropriating the

estate of the deceased and since the grant of the letters for the administration of the deceased's estate was unlawfully procured, the court be pleased to revoke letters of administration of the estate of Joel Simbo Kirundwa pursuant to **S. 49(1)(a)(b)(c) and (2)** of the **Probate and Administration of Estates Act** Cap. 352 R.E 2002 and that, the applicant be appointed the administrator in lieu of the former. The counsel finally prayed for the grant of the application with costs.

On the part of Mr Mudhihir Magee for the respondent in reply to the submission in-chief, submitted and prayed for the court to adopt the contents of the counter affidavit sworn by Lilian Rajabu Kirundwa to form part of their submission in reply to the submission in chief. He claimed, the applicant is not a legal wife of the deceased. To him, it is the presence of the marriage which gives the applicant the *locus stand* to challenge the appointment of the respondent by the trial lower court. He submitted that, the applicant has failed to prove that, the applicant is indeed the wife of the deceased. He said, marriage being an institution, the one who alleges must prove the presence of marriage. He further said, one of the evidences to prove marriage is the existence of marriage certificate as provided under **S. 55(c) of the Law of Marriage Act**, Cap 29 R.E 2019.

The counsel further contended that, it was not true that, the deceased and the applicant have cohabited for 25 years and that, the surrounding community recognised the applicant and the deceased as husband and wife. He said such an allegation connotes the presence of presumption of marriage of which the counsel for the applicant had not stated or mentioned anything in the nature of presumption of marriage under **S.**

160 of the Law of Marriage Act hence, the counsel for the applicant cannot later re-join on presumption of marriage. He said, the affidavit in support of the application is silent on the issue of presumption of marriage.

The counsel went ahead listing the elements which need to be established when asserting/raising the presumption of marriage including the following:

- (1) The applicant/petitioner must have cohabited with the deceased for over two years.
- (2) The parties must have acquired the reputation of husband and wife.
- (3) There must be no formal marriage ceremony between the said couples. With the above elements, the counsel cited the case of **JOHN KIRAKWE VS IDEL SICO [1989] T.L.R 215**. He argued that S. 160 of the Law of Marriage calls for proof of the said elements. According to him, there is no any proof before the court revealing that the deceased and the applicant cohabited for over two years. It is the community which can prove that, the applicant and the deceased cohabited for over two years and not the applicant alone. He said, the applicant's assertion on the existence of marriage was supposed to be supported by more than one affidavit such as affidavit of people in the community of the deceased which recognises that, the applicant and the deceased were husband and wife and that, such affidavit were supposed to be annexed to the affidavit.

He further said, the applicant has four children and were mentioned under paragraph 4 of the affidavit in support of the application and according to him, those 4 children ought to have sworn the affidavit to support the allegation by the applicant that, the same cohabited over 2 years. On the 2nd element over the reputation of husband and wife. To him it is the community which can prove that the applicant and the deceased were husband and wife hence the applicant was supposed to bring or attach the affidavit of other people who could witness that. On the element of marriage ceremony, he submitted that the ceremony could have not been possible because the applicant is still the wife of one Mr Ignatus Maseko and that, it is not possible for a woman to be married by 2 men and that, Ignatus Maseko swore the declaration that, he still recognises the applicant as his wife and that, the said declaration has not been disputed because no rejoinder was filed by the applicant in respect of the declaration. Moreover, the applicant still retains the surname of Maseko as the application has been brought under the name of Anneth Athman Maseko otherwise the applicant would be using the surname of the deceased.

The counsel went ahead stating that, Mr Maseko was blessed with 4 issues mentioned under paragraph 4 of the counter affidavit which has not been disputed. Hence, the presumption of marriage can as well be presumed between the applicant and Mr Maseko as they got 4 children together with the applicant.

On the pecuniary jurisdiction issue, the respondent submitted, in the trial lower court, the respondent indicated for the gross value of the estate to be 82 Million Tanzanian Shillings that, the law requires the petitioner to

give estimates of the value of the property. According to him, it was very proper for the respondent to view the value as she did. He said, the applicant has disputed the value to be 82 Million Tanzanian Shillings but failed to indicate the actual value of the deceased's estate. Moreover, the affidavit in support of the application is silent as to the value of the deceased's estate to disprove the gross value of the estate of 82 Million Tanzanian Shillings as indicated by the respondent before the trial court. He contended, nothing so far has been brought or submitted by the applicant to prove that, the gross value of the estate is over 100 Million Tanzanian Shillings.

The respondent further stated, the submission by the counsel for the applicant on the value of the properties is based only on assumption and the court cannot act on assumption without any proof. The applicant has informed the court over 10,000 sqm landed property at Iyumbu-Dodoma to have been purchased at 17,000 Tanzanian Shillings @ sqm but no proof was submitted apart from the mere assertion. He said, even if the actual value of the gross estate is more than 100 Million Tanzanian Shillings, this court has no power to invalidate the appointment basing on the issue of pecuniary jurisdiction as seen under **S. 86(1) of the Probate and Administration of Estates Act**, Cap. 352 R.E 2002. On the 2nd ground that, the grant was procured fraudulently, the counsel stated, such a ground was not pleaded in the affidavit in support of the application and that, referring the children of the deceased as relatives is an immaterial objection and it cannot be used to invalidate the appointment. He said, there is no harm and no law which has been broken by calling or referring

children as relatives and that, such a minor error cannot be a ground to revoke letters of grant under **S. 49 of the Probate and Administration of Estates Act**, Cap. 352 R.E 2002.

The counsel for the respondent added that, the failure to obtain consent has not been pleaded in the affidavit in support of the application and that, the allegation was an afterthought. According to him, the consent was given by the people mentioned by the counsel for the applicant during the hearing in chief and the said consent was filed in court as reflected in the proceedings. He said, there is nowhere in the law or any provision which indicates that, failure to give consent invalidates the grant. He submitted further that, the applicant was not involved because he was not a wife of the deceased. He said, the deceased and the applicant by virtual of being business partners owned the properties together including being a shareholder in Room Furniture Company Ltd.

As to the issue of Erick Kirundwa to support the applicant is immaterial before the court and more so, the same has not been pleaded in the affidavit in support of the application and no any proof to reveal that, Erick Kirundwa is in support of the applicant. The respondent added and maintained that, she resides in Kigamboni and Kawe that is why, the authority at Kawe gave her the introduction letter and that, the applicant has not convinced the court to show how the respondent is not a resident of Kawe.

According to the respondent, the loss was reported to police on 3rd August, 2021 and not 14th March, 2021 as suggested by the applicant. The counsel

further submitted that the 3rd ground of misapplying and misappropriation of the deceased's estate is a fact which needs to be proved. He said, there is no any proof that, the respondent misapplied the deceased's estate. According to him, there is no proof to reveal that, the respondent collected the alleged rent and that, in any case if the respondent collected rent, she did it as an administrator of the deceased's estate. The counsel further said, this honourable court has no jurisdiction to revoke the grant under **S. 79(1)(a)(3) of the Civil Procedure Code**, Cap 33 R.E. 2019. He further said that, the court can only revoke the grant if the trial court exercised the powers which were not conferred to it under the law. Since the Probate and Administration of Estates at **S. 6(1) of the Probate and Administration of Estates Act** empowers the District Court with Jurisdiction to grant letters of administration hence the grant of the letters was within the jurisdiction of the court. When submitting in reference to the submission in reply, the counsel for the applicant submitted that, much of the reply by the respondent based on marriage issues but the concern of the application is over probate issues. He said even for marriage matters, the applicant had categorically stated under paragraph 1 of the applicant's affidavit in support of the application that, she had cohabited with the deceased for about 25 years since 1996 till the death of the deceased. He further said on the point of the declaration by one Maseko as annexed at the counter affidavit at paragraph 3, according to him, marriage cannot be proved by declaration as the respondent submitted but through production of marriage certificate, customary marriage and presumption of marriage. As for the applicant, the presumption of marriage is proved because the

applicant had lived with the deceased for over 25 years. He said, the principle of law basically under **S. 110 of the Law of Evidence Act** rests the burden of proof to the one who alleges and that, it is the duty of the respondent to prove that the value of the estate listed in the trial court confirms to pecuniary jurisdiction of the trial court. The duty of the applicant was just to disprove the allegation. The submission by the applicant based on the value of the deceased's estate is grounded on common sense, logic and the location of the estate in particular the house located at Mbezi-Beach area and the common sense dictates that, there can never be a storey building with one flat valued at 40 Million Tanzanian Shillings.

As to the Iyumbu -Dodoma landed property, the applicant had stated the value by indicating the price of 1 sqm which was bought at 17,000 Tanzanian Shillings each and that, there are 10,000 sqm which should make a total of Tanzanian Shillings 170 Million. Since the high court has revisionary powers over the district court through its inherent powers, *SUO moto* can order for collection of additional evidence or revise the proceedings to satisfy itself on the correctness and authenticity of the given orders by the lower court. The rest of the submission was purely a reiteration of what has already been submitted in chief. That was the end of the rival arguments between the applicant and the respondent.

Thus, the issues for determination of the application for revision are:

- (a) Whether the court is bound to receive proof and other evidence from the parties other than hearing based on the application pleadings in considering the prayer to revise the lower court's proceedings and the legality of its orders.*
- (b) Whether there was any other relationship between the applicant and the deceased other than partnership and directorship relationship between the applicant and the deceased. Whether cohabitation for 25 years between the deceased and the applicant need any other proof to form a presumption of marriage. That said, whether it was proper for the respondent not to involve the applicant as a wife of the deceased capable to be one of the beneficiaries of the deceased's estate.*
- (c) Whether the applicant can be appointed as administrator of the deceased's estate in lieu of the respondent at this very stage of the revision.*
- (d) Was it proper for the respondent to apply for the grant of letters to administer the deceased's estate without disclosing whether the deceased had left surviving heirs such as children, wife or parents who should be regarded as beneficiaries?*
- (e) Who should give consent for the grant of letters of administration of the deceased's estate between the relatives and surviving heirs who*

are regarded as beneficiaries? Was the deceased's family described when applying for the grant of the letters?

(f) What was the permanent address of fixed abode of the deceased one Joel Simbo Kirundwa? It is the address of fixed abode of the deceased which will assist the court to trace where exactly the family meeting was supposed to take place.

(g) What should be the necessary orders to be issued by this court?

As regards to the **1st issue** on *Whether the court is bound to receive proof and other evidence from the parties other than hearing based on the application pleadings in considering the prayer to revise the lower court's proceedings and the legality of its orders*, the high court is enjoined and empowered to either by its own motion or being moved to revise the lower court's decision. The assertion is proved by various provisions from various laws including the **Magistrates Courts Act**, Cap 11 R.E 2019 in which **Section 44. -(1)** provides:

"In addition to any other powers in that behalf conferred upon the High Court, the High Court-

*(a) shall exercise general powers of **supervision** over all district courts and courts of a resident magistrate and may, at any time, **call for** and **inspect** or **direct** the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay;*

*(b) may, in any proceedings of a **civil nature** determined in a district court or a court of a resident magistrate on application being made in that behalf by any party or of its **own motion**, if it appears that there has been an error material to the merits of the case involving injustice, **revise the proceedings** and make such decision or order therein as it sees fit:*

Provided that, no decision nor order shall be made by the High Court in the exercise of the jurisdiction conferred by paragraph (b) of this subsection, increasing any sum awarded or altering the rights of any party to his detriment, unless the party adversely affected has been given an opportunity of being heard” (Emphasis supplied).

From the above provision of the law, it is settled by legal implications that, the high court may either through its own motion revise the lower court's proceedings, order or any decision entered by the subordinate courts particularly the district court and court of resident magistrate. In so doing, the high court is not expected to receive any proof or evidence from anywhere but on the basis of the records remitted to it from the lower courts. There can never be any challenge or objection on the basis of failure to substantiate or prove because the records will speak for themselves. The same spirit is adopted when the court has been moved to revise the lower court's records by the parties. The court will definitely go through the application pleadings by both parties that is to say, the chamber summons indicating the prayers, the applicant's affidavit, the counter affidavit and the rejoinder if any, including the statements said

during the hearing of the application by the parties themselves. As such, the parties are only expected by the court to adduce statements through hearing in support of what has been stated under the pleadings. This position is what was expected of the parties, nothing less, nothing more.

The applicant has moved the court for several prayers including a prayer for this honorable court to be pleased to revise the district court of Kinondoni's order in relation to the grant of letters in favour of the respondent on several grounds. The mere assertion of ground based on lack of jurisdiction by the lower court, failure to mention and include lawful heirs of the deceased when applying for the grant of letters of administration of the deceased's estate are sufficient enough for the court to call for records and examine the correctness and legality of the lower court's records.

I am aware of the position of the law which requires that, any revision or appeal based on the ground of lack of jurisdiction should not be dealt by the court on its own motion but by hearing both parties. The aforesaid position of the law was seen in the case of **MIRE ARTAN ISMAIL AND ANOTHER VS SOFIA NJATI**, CIVIL APPEAL NO. 75 OF 2008 (Unreported) in which the Court of Appeal said:

"...we are of the firm view that, the omission to give the parties a hearing on the issue of jurisdiction occasioned miscarriage of justice."

In considering revising the lower court's records, the court had indeed afforded a chance for both parties to submit over the issue of lack of

pecuniary jurisdiction by the lower court, Kinondoni District Court as reflected in the chamber summons at prayer (c). It is therefore not proper for the respondent through her counsel one Mr Mudhihir Magee to argue that, this court has no jurisdiction to inquire on the issue of jurisdiction. The applicant has submitted that during hearing of the application the house located on plot No. 606 Block G Mbezi-Beach had been underpriced at Tanzanian Shillings 40 Million. The counsel for the applicant submitted that, under common sense, a building with one flat in a prime area such as Mbezi-Beach cannot be that much cheap. According to the applicant, the house is estimated to be over 150 Million Tanzanian Shillings. In such a scenario, we do not expect any further proof when revising other than testing the assertions in the light of the available clear records.

The respondent through hearing of the application and on the basis of the records had estimated the landed property at Iyumbu-Dodoma at the price of Tanzanian Shillings 32 Million while the applicant through her counsel had clearly stated that, the Iyumbu plot has 10,000 sqm in which each sqm is valued at 17,000 Tanzanian Shillings as per market price which attracts the amount of 170 Million Tanzanian Shillings. Considering the Bunju plot and the Room Furniture, it was not possible for the estates to be administered to be valued at Tanzanian Shillings 82 Million only.

It was on that basis, the applicant sought the intervention of the court through revision to quash the decision, order and the entire proceedings of the lower courts. With the above, the high court is not bound to receive proof and other evidence from the parties other than the hearing based on the application pleadings in considering the prayer to revise the lower

court's proceedings and the legality of its orders. From the hearing based on the application pleadings, it is very obvious that, the properties mentioned in the order of the District Court at Kinondoni through its ruling at page 2 of the typed ruling, that is: land located on plot No. 609 Block G Mbezi-Beach, land located on plot No. 90 Block 20 Bunju Area, land located on Iyumbu New Town Center (Dodoma with no clear description on plot number and block numbers, whether surveyed or unsurveyed), shares at Room Furniture Centre Limited with no clear description on the number of shares the deceased owned cannot in any way be valued at 82 Million Tanzanian Shillings as estimated by the respondent. Had it been the applicant was informed of the probate cause and been involved, perhaps the lower court would have arrived at the clear value of the properties of the deceased including giving out clear description of the landed property at Iyumbu-Dodoma whether the same is surveyed or unsurveyed, title deed numbers and the nature of occupancy of the said land whether is a joint occupation or otherwise.

Looking closely on the petition form No. 27 by the petitioner, the respondent in this case had listed several properties left by the deceased one Joel Simbo Kirundwa, for instance at item three, it is indicated "*Land located at Iyumbu new Town Centre Dodoma valued at 32 Million*". The indicated property has no further description whether it is surveyed or not including the nature of occupancy if the same is jointly occupied or not. It is obvious that, the respondent did not know the plot in question hence unaware if the same could either be under joint occupation or not. Such further and better particulars are very material for the court in testing

whether the property in question involves joint occupation to the extent of attracting other interested parties who might have interest in the deceased's properties.

The mistake did not end there, looking closely at item four of the same petition, the respondent indicated "*shares at Room Furniture Centre Limited*" without disclosing how many shares the deceased owns at Furniture Centre Limited, the location and fixed address of the Company and if possible to tell who are the directors and shareholders of the Company for the court to ascertain the value of the shares and test if the petition was proper before him and a justification for the pecuniary jurisdiction of the court.

In the absence of clear description of the properties, location, whether surveyed or not, number of shares in Room Furniture Centre Limited owned by the deceased, the lower court was not in a position to test whether it had pecuniary jurisdiction over the probate cause or not. The lower court simply proceeded in darkness, assumed to be clothed with jurisdiction while the records and the listing of the said properties do not favour the court assumption.

The respondent had not stated or given any explanation as may be acceptable by the court as to why she has not given the description of the aforesaid noted properties. Indeed, the lower court ought to have noted such a mistake and could have ordered for the rectification by the respondent before the court assumed pecuniary jurisdiction over the probate cause in question. Having said much and observed as described

above, the lower court had no pecuniary jurisdiction to entertain the probate cause which falls outside small estate (see **section 6 of the Probate and Administration of Estate Act**, Cap 352 R.E 2002). In the light of the available records with observation gathered during hearing of the application by both parties and in consideration of the inherent powers of the court as provided under **section 95** of the **Civil Procedure Code**, R.E 2019 which provides:

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court".

I am of view that, the properties involved and listed as the deceased's properties fall under large estate capable to be entertained by the high court hence declare as before that, the lower court had no pecuniary jurisdiction in respect of probate cause No. 133 of 2021. With that in mind, will in the final analysis issue necessary orders as a remedy to the above incurable error.

The **2nd issue** of determination is *whether there was any other relationship between the applicant and the deceased other than partnership and directorship relationship between the applicant and the deceased. Whether cohabitation for 25 years between the deceased and the applicant need any other proof to form a presumption of marriage. That said, whether it was proper for the respondent not to involve the applicant as a wife of the deceased capable to be one of the beneficiary of the deceased's estate.*

In addressing the above issue, one has to go to the application pleadings by both parties in the affidavit by the applicant and a reply thereto through a counter affidavit. It is not disputable that, the deceased one Joel Simbo Kirundwa and the applicant were business partners, shareholders and Directors of Room Furniture Centre Limited and other Companies not mentioned. This is revealed at paragraph 4 of the applicant's affidavit that when she fell sick, she made the deceased as one of her signatories, business partner and one of the directors in certain companies.

The fact which is not disputed by the respondent as seen in her counter affidavit at paragraph 5. I am trying to inquire with a view to find out whether there was any other relationship between the applicant and the deceased apart from the aforesaid relationship. Looking closely the wording of paragraph 4 of the affidavit of the applicant in support of the application, the applicant partly states:

"...in 1996, the relationship between me and the deceased turned into love affairs...."

Likewise at paragraph 1 of the same affidavit, it is partly stated:

"...I am a business woman and a wife of the deceased person one Joel Simbo Kirundwa having cohabited and lived as husband and wife since 1996 up to his death on 14th March, 2021....."

Before me is just an application to revise having perused the lower court's records on the legality of the order made by the lower court on the probate cause No. 133 of 2021. The application for revising the lower court's records is not expected to involve issues of proof and submission of

evidence on the existence of marriage between the deceased and the applicant. Given a chance, during considerations on whether to grant the letters of administration of the deceased's estate a court can further inquire further and better particulars relating to the existence of marriage between the deceased and the applicant. The court hearing the application for the grant of letters of administration can even go far to inquire on the state and nature of the tenancy in the house No. 609 block G Mbezi-Beach whether it was a joint occupier tenancy, Was the loan secured by the parties as husband and wife? All such questions could be answered by the court hearing the application for the grant of letters of administration in respect of the deceased's estate upon requesting the parties to submit in any case if it is disputed that, the applicant is not a wife of the deceased.

One could easily be convinced that, the applicant is a legal wife of the deceased due to the fact that, the available explanations as revealed in the affidavit, taking care of the deceased when he was sick including sending him to various hospitals such as CCBRT, Rabininsia and Muhimbili National Hospital at the applicant's expenses without any assistance from the so called relatives including the respondent. The entire counter affidavit and the petition do not say anything or give any historical background of the deceased's sickness and whether the relatives attempted to treat the deceased at any hospital other than taking the deceased to various church for prayer.

The respondent having denied the fact that, the applicant is not a wife to the deceased has stated under paragraph 7 of her counter affidavit, partly that:

".....the deceased never stayed with the applicant at Msasani but stayed at Msasani with his girlfriend one Restituta William Mally and after becoming seriously sick, he decided to shift from Msasani to Kawe and later on to Kigamboni for the purpose of living close with his relatives who took care of him up to his demise".

Making a simple reasoning from the contents of the counter affidavit as reflected above, both the petition and the counter affidavit do not dispute the fact that, the deceased died intestate at Rabininsia hospital but the same do not tell about who was responsible taking care of the deceased while at the hospital and how the deceased was referred to Rabininsia hospital and who actually registered the deceased at the hospital leave alone who was refuting the hospital bills.

The counter affidavit is couched in a manner as if the deceased went to his relatives in both Kawe and Kigamboni on his own while he was seriously sick. Since the deceased was seriously sick, there is no way he could have moved himself and shifted to Kigamboni from both Msasani and Kawe to Kigamboni without being escorted. If he was escorted who escorted the deceased while sick to both Kawe and Kigamboni?

Should the court believe that it was the deceased's purported girlfriend in the counter affidavit at paragraph 7 one Restituta William Mally? If yes, why is it not mentioned anywhere in the affidavit that such a girlfriend was the one who took the deceased from Msasani to Kawe and later to Kigamboni?

The applicant in her affidavit from paragraph 9, 10, 11, 12 particularly at paragraph 9 had explained the way the deceased's relatives went to her home at Msasani and took away the deceased to prayers in Kawe and Kigamboni. It is obvious that, the relatives took the deceased while sick from the applicant's matrimonial home with the deceased. The applicant further narrated under the affidavit that, the deceased later escaped the relatives and came back to his matrimonial home at Msasani and continued to live with the applicant and that, it was the applicant who later took the deceased to Rabininsia hospital and incurred medical expenses in respect of the deceased. However, the respondent and her lawyer are escaping such a narration, they simply state that the deceased died at Rabininsia Hospital without telling the court the logistics of going to the hospital and the incident of death. For example, how many days did he stay at the hospital under whose care? Since the respondent did not volunteer any information regarding the circumstances surrounding the death of the deceased by telling the court a clear address of fixed abode of the deceased, where did the deceased live before he was referred to the hospital, so far it is silent whether it was the deceased's relatives who took him to the hospital or it was the purported girlfriend whose contribution towards the medical treatment of the deceased has not been described.

In the light of the available records, the applicant had marriage relationship through the revealed cohabitation suffice to conclude that, the applicant has all the signs and indicators to be regarded as a wife to the deceased worth to be involved in the deceased's estate as a potential beneficiary.

The **3rd issue** focuses on *whether the applicant can be appointed administrator of the deceased estate in lieu of the respondent at this very stage of the revision.*

The issue above is very simple to answer, as a court when revising the lower court's records, the court does not embark itself on matters supposed and capable to be determined by a proper application before the court. So far, no any application for grant of the administration of the deceased's estate one Joel Simbo Kirundwa have been filed in court. The respondent was appointed an administrator of the deceased's estate in the lower court, whether the same grant is to be revoked or not, still a new appointment of the applicant as administrator in lieu of the respondent cannot be considered or done here in the absence of the application to that effect. Therefore, the applicant cannot be appointed as administrator of the deceased's estate through this application at hand but rather in a different forum when the same will be ordered. In the absence of an order declaring a different status of the respondent as administrator of the deceased's estate, the applicant cannot apply and be appointed as an administrator of the deceased's estate.

The **4th issue** is *whether it was proper for the respondent to apply for the grant of letters to administer the deceased's estate without disclosing as to whether the deceased had left surviving heirs such as children, wife or parents who should be regarded as beneficiaries?*

The lower court's records especially the petition, the respondent as an applicant for the grant of letters of administration of the estate of the deceased one Joel Simbo Kirundwa had not revealed whether the deceased had children. The respondent simply indicated Julian Joel Kirundwa, Joan Joel Kirundwa and Jesca Joel Kirundwa as surviving relatives of the deceased not as children. The petition did not even describe if the deceased had parents or not. The disclosure of such information could assist the court in knowing the rightful heirs of the deceased's estate. The parents are regarded as among the beneficiaries therefore, a clause statement disclosing whether the deceased had left surviving parents would have assisted the lower court in tracing the beneficiaries. This concern was raised during hearing of the application by the applicant and the respondent simply responded that, there is no harm calling or regarding children as relatives and that, no error has been committed by the respondent. I have failed to comprehend the submission by Mr Magee the counsel for the respondent by submitting that there is no harm calling or regarding children of the deceased as relatives of the deceased. To be sincere, in as far as probate matters are concerned especially when the deceased was prophesying Christianity, the relatives in Christian probate matters, cannot inherit unless it is stated under the will. The wife of the deceased, children and parents are regarded as lawful heirs of the deceased's properties. The relatives can only be preferred if the mentioned categories of people are nowhere to be traced. In the absence of the proof on non-existence of the deceased's wife, children or parents, the relatives

can never be preferred to be heirs and beneficiaries of the deceased's estate.

The petition by the respondent in the lower court does not show or even reveal the rightful heirs of the deceased's estate. The respondent must have had ill motive in referring the surviving children of the deceased as relatives knowing exactly those relatives are not entitled right to inherit the deceased's estate. Having noted and realised a mistake committed in the lower court in not listing the children as among the surviving heirs, this time around through counter affidavit, the respondent at paragraph 10 has listed the surviving children of the deceased including annexing their birth certificates something which was supposed to be done during the application for the grant of letters of administration and before the same were granted to the respondent. Listing the children at this stage cannot assist the court in any way because if it is to administer the deceased's estate, the same have been administered by the respondent treating the surviving children mentioned under para 10 as relatives with the effect of not benefiting from the estate of their deceased father.

The respondent attached the birth certificates and departed from the generally recognized practice of indicating the date and year the children were born. In ascertaining the age of the children the court now has to calculate right away from the submitted certificates, why? I suppose, the respondent is escaping the reality that, **Juliana Joel Simbo is currently over 19 years of age, adult and capable** to stand as administrator on behalf of her siblings and not to be represented by the aunt as it is the case in question. From the birth certificate of Juliana Joel Simbo, she was

born in the year 2002, it is obvious that, she is over 19 years now hence capable to stand either as a co-administrator or sole administrator of the deceased's estate. Even if the respondent would opt as she did not to involve Juliana Joel Simbo as an administrator, she would have at least called her in court to give her consent for the aunt to proceed administering the estate on their behalf.

S. 33 (1) of the Probate and Administration of estates Act, Cap 352 R.E 2002 provides as to who can be granted letters of administration as follows:

(1) Where the deceased has died intestate, letters of administration of his estate may be granted to any person who, according to the rules for the distribution of the estate of an intestate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate.

The above provision is self explanatory. The respondent according to the above is not among the beneficiaries but she has successfully applied for the grant of letters for the administration of the deceased's estate and the letters were granted by the lower court, Kinondoni District Court as if the beneficiaries were nowhere to be found whereas the 1st born of the deceased qualifies because she is 19 years old. It is also as if the parents of the deceased were nowhere to be found but the respondent did not tell the court anything about the parents of the deceased. The deceased's children and the widow were never involved in clan meeting. It is by this I

indeed find that, the respondent one Lilian Kirundwa Rajabu had an ill motive and she is unfit to be appointed administrator of the deceased's estate as the lower court did.

It was therefore improper for the respondent to apply for the grant of letters of administration in respect of the deceased's estate in lieu of the deceased's wife, children and parents. So far, while the court is not so sure as to the existence of the deceased's parents but at least, the court is sure of the existence of the deceased wife and the 3 children mentioned in the counter affidavit of the respondent. Why then should the respondent trouble herself to undertake such a cumbersome duty of administering the estate of the deceased while the lawful heirs and beneficiaries are known and can indeed apply to administer the estate?

The **5th issue** focuses on *who should give consent for the grant of the letters of administration of the deceased's estate between the relatives and surviving heirs who are regarded as beneficiaries? Was the deceased's family described when applying for the grant of the letters?*

The above issue has been partly answered in both 3rd and 4th issue, it is the beneficiaries and lawful heirs who can give consent (**See Rule 71 of the Probate Rules**). The consent filed by the respondent at the district court was sought from relatives who attended the clan meeting. In examining the family minutes, the meeting was only attended by relatives revealing *Baba wadogo, Shangazi, Dada, Binamu, Mpwa, Shemeji* with no any brother, wife of the deceased, children of the deceased or parents of the deceased. To whose probate interests was the meeting trying to

safeguard if the rightful heir/beneficiaries were not called to attend? It appears that, the family meeting was conducted in the premises of one Eliakim I. Kimaro at Kawe Ukwamani- Dar es Salaam. The record reveals that, the deceased has a residence with address of fixed abode at Msasani with no any other details of the residential address apart from the address given by the applicant as she was the one residing with the deceased. Likewise, the deceased was buried in Hai Kilimanjaro, if everything remains constant, it is expected that, the family meeting to appoint the competent person to apply for the grant of letters of administration of the deceased's estate should either be conducted in Hai where the deceased was buried or in Msasani-Dar es Salaam where the deceased ordinarily had a permanent fixed address of abode. So far it is not clearly known as to the permanent address of the respondent one Lilian Kirundwa Rajab to assist the court establish a justification for the respondent to conduct the family meeting. In the administration oath as per records, the respondent declares to be a resident of Dar es Salaam without disclosing which part of Dar es Salaam she ordinarily resides. Likewise, the records state in the affidavit as to the domicile of the deceased that at the time of death, the deceased domiciled in Kinondoni without describing the specific area and permanent address of fixed abode. This also seems to be intentionally concealed and left undisclosed, why? It is also revealed under the said affidavit as to the domicile of the deceased that, the respondent is a resident of Dar es Salaam without describing the specific areas and District she was residing. Something must have gone wrong in not disclosing such material information to the court.

In the form No. 48, the respondent and one Estar Imbya Kimaro have declared themselves to be residents of Dar es Salaam without revealing which part of Dar es Salaam to assist the court in tracing the permanent address of the administrator. The same mistake has been repeated under the counter affidavit by the respondent declaring herself to be a resident of Dar es Salaam without further and better particulars of her permanent address of fixed abode. Under the counter affidavit, she has not even indicated the postal address, in any case if the deceased's estate is misappropriated where can the court trace the respondent as administrator to effect arrest for her to be accountable?

It appears from both the records and the application pleading that the respondent failed to fully describe the addresses of the family relatives of the deceased when applying for the grant of letters of administration raising doubts on the competency of the respondent to administer the deceased's estate in question.

The **6th issue** dwells on determining *the permanent address of fixed abode of the deceased one Joel Simbo Kirundwa? It is the address of fixed abode of the deceased which will assist the court to trace where exactly the family meeting was supposed to take place.*

The failure by the respondent to clearly indicate the permanent address of fixed abode including the residence of the deceased, the failure by the respondent even to describe the Msasani house where the deceased used to reside with the alleged and purported girlfriend for the court to be able

to trace and determine the fixed address of abode of the deceased to point out the possible areas where the family meeting ought to have been conducted. The deceased was a reputable gentleman with strong properties; he cannot be regarded to have died like a wondering small boy in the street. He must have had a permanent address of fixed abode presumably the address given by the applicant, a wife of the deceased. Indeed, since the family meeting was not conducted in Hai-Kilimanjaro where the deceased was buried, it was obvious that, the family meeting was supposed to be conducted at the applicant's premises in Msasani where the deceased had his permanent address of fixed abode. That answers the last but one issue to mark the end of the determination of the matter before the court.

Finally, the **7th issue** answers *what should be the necessary orders to be issued by this court?*

In the light of the Provisions of the **Probate and Administration of Estates Act, R.E 2002, at section 49:**

" (1) The grant of probate and letters of administration may be revoked or annulled for any of the following reasons–

(a) that the proceedings to obtain the grant were defective in substance;

(b) that the grant was obtained fraudulently by making a false suggestion, or by concealing from the court something material to the case;

(c) that the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently;

(d) that the grant has become useless and inoperative;

(e) that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect.

(2) Where it is satisfied that the due and proper administration of the estate and the interests of the persons beneficially entitled thereto so require, the High Court may suspend or remove an executor or administrator (other than the Administrator-General or the Public Trustee) and provide for the succession of another person to the office of such executor or administrator who may cease to hold office, and for the vesting in such person of any property belonging to the estate”.

From the above provision of the law, it is clear that, the records as discussed above entirely through the proceedings towards obtaining the grant by one Lilian Kirundwa Rajab were defective in substance because of the anomalies discussed above including obtaining the grant fraudulently by making a false suggestion, or by concealing from the court issues material to the case such as failure to reveal the surviving deceased's wife (the applicant), the children and failure to disclose whether the parents of the deceased are still surviving or not. The failure of the respondent to clearly indicate the clear address of fixed abode as the deceased domicile, naming the children of the deceased as relatives while they are beneficiaries, all these have made the court to believe that the grant was obtained by means of fallacious allegation of a fact essential in point of law

to justify the grant, although such an allegation was made in ignorance or inadvertently.

IN THE MATTER OF THE ESTATE OF THE LATE SELEMANI OMARY KIPWIMBWI AND IN THE MATTER OF APPLICATION FOR REVOCATION OF GRANT OF LETTERS OF ADMINISTRATION OF THE LATE SELEMANI OMARY KIPWIMBWI AND MAHINGA SELEMANI KIPWIMBWI, MISC. CIVIL APPLICATION NO. 783/2016, HIGH COURT-DAR ES SALAAM DISTRICT REGISTRY- Unreported. Her Ladyship Ebrahim, J said:

"In the circumstances therefore, I accordingly annul and revoke the grant of letters of administration of the Estate of the late Omary Selemani Kipwimbwi granted to Hamisi Selemani Kipwimbwi. The reason being that the grant was obtained by means of untrue allegations of a fact essential in point of law to justify the grant that there is no WILL much as such allegation could have been made in ignorance or inadvertently as claimed by the respondent (section 49 (1) (b)(c) and (e) of CAP 352 RE 2002). I order the respondent i.e. Hamisi Selemani Kipwimbwi to forthwith surrender letters of administration to this court in terms of Section 51(1) of the Act and Rule 29(4) of the Probate Rules; and I further order him to account for and deliver all proceeds (if any) obtained in course of the administration of the deceased estates".

The high court in the above case revoked the letters of grant granted to the applicant/petitioner because the same were obtained through fraudulent means and concealment of the material information as it is the case for the respondent in this application. With the above, I hereby make the following orders:

- (a) The letters of grant to administer the deceased's estate for the late Joel Simbo Kirundwa granted to the respondent one **Lilian Kirundwa Rajabu** are hereby revoked.
- (b) The respondent one **Lilian Kirundwa Rajabu** should surrender letters of administration to this court in terms of Section 51(1) of the Act and Rule 29(4) of the Probate Rules in 7 days from the date of this order.
- (c) The lower court, Kinondoni District Court had no jurisdiction to determine large estates; such jurisdiction is bestowed to the High Court.
- (d) From the available records, the applicant one **Annath Athuman Maseko** is a lawful wife to the deceased capable to be regarded as heir and beneficiary with the three surviving children of the deceased mentioned as Juliana Joel Simbo, Joan Joel Simbo and Jesca Joel Simbo.
- (e) The applicant one **Annath Athuman Maseko** is directed to apply to be appointed administrator of the deceased's estate one Joel Simbo Kirundwa by involving the surviving children of the deceased as mentioned in (d) above.

- (f) The respondent one **Lilian Kirundwa Rajabu** is declared incompetent and unfit to re-apply for the grant of letters of administration of the deceased's estate one Joel Simbo Kirundwa after revocation.
- (g) In any case if there is any money or properties that came into the hand of the respondent one **Lilian Kirundwa Rajabu** while administering the estate should be immediately surrendered to the lawful heirs of the deceased, the applicant and the surviving three children. The respondent should make good the account of the administered properties amicably before the law could take its course.
- (h) For any relative of the deceased interested to conduct the family meeting, it is directed the meeting to be conducted at the place where the deceased had his permanent fixed address of abode which is Msasani area where the deceased used to reside with the applicant. **However**, the family meeting to appoint the person to administer the estate of the deceased is not mandatory as it was observed in the case of **FADHILI JORDAN s/o MWAKYEMBE VS ZAINABU d/o MOHAMED@SELEMAN, PC PROBATE APPEAL NO. 5 OF 2021** in which Kahyoza, J. said:
- "I totally agree with the findings of the District Court that there is no law saying that the court should not appoint a person to administer the deceased's estate unless is nominated by the deceased's family members".*

I have endeavored to the above position of the law to send signal to the relatives of the deceased that, in any case if they do not cooperate with the applicant (the deceased's wife) including the surviving children of the deceased to appoint a person to apply for the grant, the applicant one **Annath Athuman Maseko** could proceed to make application before the high court by involving the three surviving children of the deceased to be appointed as administrator of the deceased's estate in the absence of the family meeting.

- (i) Since the copy of the birth certificate of the deceased was filed in the lower court **Probate Cause No.133/2021**, the applicant is allowed to use the copy so filed before the lower court when applying for the grant of letters of administration of the deceased's estate before the high court.
- (j) Proceedings of the probate cause No. 133 of 2021 are nullified and the decision and orders of the lower court to appoint **Lilian Kirundwa Rajabu** are quashed.
- (k) The application to revise the lower court records is granted.
- (l) Each party to bear own costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 18th day of November, 2021.



N.R.MWASEBA

JUDGE

18/11/2021