

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPEAL NO. 47 OF 2008**

**(CORAM: MUNUO, J.A., KILEO, J.A. And LUANDA, J.A.)**

**NASSER E. MWAKAMBOJA..... APPELLANT**

**VERSUS**

**ARTHUR ALFRED MAMBETA.....1<sup>ST</sup> RESPONDENT**

**MOHAMED JAFFER SHEIKH.....2<sup>ND</sup> RESPONDENT**

**(Appeal from the decision of the High Court of Tanzania  
at Dar es Salaam)**

**(Shangwa, J)**

**Dated 11<sup>th</sup> day of November, 2007**

**in**

**Probate & Adm. Cause No. 58 of 2005**

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**RULING OF THE COURT**

3<sup>th</sup> December, 2008 & 5<sup>th</sup> February, 2009

**LUANDA, J. A:**

The above named respondents successfully petitioned in the High Court for the revocation of the letters of administration granted to the appellant as administrator of the estate of the late Mohamed Shaffi Sheikh. In his stead, the High Court appointed the respondents to administer the said estate.

The appellant is aggrieved by that decision. He filed an appeal in this court.

A day before the appeal was called on for hearing, the respondents through the Professional Center and Mmanda and Company Advocates raised a preliminary objection, a notice of which was duly given as provided under rule 100 of the Court of Appeal Rules Cap 141 (subsidiary legislation). The preliminary objection raised reads as follows, we reproduce:-

*That in so far as the decision of the High Court of Tanzania being appealed against is appellable with leave, this appeal is incurably incompetent for having been lodged without the prerequisite leave being sought and obtained.*

In these objection proceedings, Mr. Kamara and Mr. Mmanda learned counsel appeared for the respondents; whereas Mr. Mafuru from Mbuna and Company Advocates represented the appellant.

It is Mr. Kamara's submission that the appellant intends to appeal against the order which revoked his appointment as administrator of the estate of the deceased. That order was made under S. 49(2) of the Probate and Administration of Estate Act Cap. 352 (henceforth referred to as the Act) which falls under Part VI. He went on to say, s.5(1)(a) and (b) of the Appellate Jurisdiction Act,

Cap 141 (Principal legislation hereinafter referred to as the AJA) enumerates orders which are appellable as a matter of right. The order of revocation of letters of administration is not one of those orders. So, leave ought to have been sought and obtained as provided under s.5(1)(c) of the AJA. And the same ought to have been included in the record of appeal as part of the record as provided under rule 89 (1) (i) of the Court of Appeal Rules, Cap.141 (subsidiary legislation –hereinafter referred to as the Rules).

Since, the record of appeal does not contain the aforesaid leave, he submitted that, the appeal is incompetent. The same should be struck out with costs.

He cited a number of cases, inter alia, **Jose X Ferreira V Mbaraka Salum [1994]** TLR 214 and **Ennock M. Macha V Manager, NBC Tarime [1995]** 270 whereby this court has stated that if an appeal to this Court is preferred without leave of the High Court or this Court, where leave is required, then the appeal is incompetent.

He also cited **Sadiki Abdallah Alawi V Zulekha Suleman Alawi & another Civil Reference NO. 29 of 1991 CAT** (unreported) where he said the facts of that case are on all fours with our present case.

In that case one of the issues discussed by the Court was whether a decision or a decree of the High Court resulting from probate and administration proceedings is appealable with or without leave. This Court held that so long as the decision or decree did not arise from a suit under the Civil Procedure Code, the decision or decree is appealable with leave.

Responding, Mr. Mafuru submitted that no leave is required as the appeal falls under “in any other written laws” as couched in Section 5 (1) of the AJA. He went on to say, S.72(1) of the Act creates two scenarios. One, an appeal shall lie as a matter of right to an order refusing to grant letters of administration. Two, if the probate matter took a form of a suit, it is where leave is required and its order should be treated as a decree.

Referring to **Alawi’s case** cited supra he said the case is distinguishable from the case under discussion. He did not elaborate.

In rejoinder, Mr. Kamara said the appeal is in respect of a revocation order which falls under Part VI of the Act and not for the grant of letters of administration which is contained under Part VII of

the Act. He reiterated his position that the appeal be struck out for being incompetent for lack of leave.

The issue for determination and decision is whether the order which the appellant intends to challenge is appealable as a matter of right or requires leave of the High Court or this Court.

From the foregoing, the order, which is the basis of the appeal and which is also the subject matter of the preliminary objection, is the revocation of letters of administration. But that order is not among the orders enlisted under S.5(1)(b) of the AJA which enables a party to appeal as a matter of right. It is Mr. Kamara's contention that since the order is not listed among those in the aforementioned section, then leave ought to have been sought. Mr. Mafuru on the other hand said no leave is needed as the issue squarely falls under S.72(1) of the Act.

Section 72(1) of the Act reads:-

*72(2). An appeal shall lie from an order  
**granting or refusing probate or letters of  
administration made in contentious  
cases as if such order were a decree, and***

*from any other order made in such cases if an appeal would lie therefrom in a suit according to the provisions of the Civil Procedure Code or any enactment replacing the same.*

[Emphasis supplied]

The above section, as correctly pointed out by Mr. Kamara, deals with granting of probate or letters of administration and has nothing to do with revocation as is the case under discussion. The section does not apply to this case.

Section 5(1) (b) of the AJA enumerates nine orders whereby an aggrieved party may appeal without leave.

The section reads:-

*5(1) In civil proceedings, except where any other written law for the time being in force provides otherwise, and appeal shall lie to the Court of Appeal (b) against the following orders of the High Court made under its original jurisdiction that is to say:-*

- (i) An order superseding an arbitration where the award has not been completed within the period allowed by the High Court*

- (ii) An order on an award stated in the form of a special case*
- (iii) An order modifying or correcting an award;*
- (iv) An order filing or refusing to file an agreement to refer to arbitration;*
- (v) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;*
- (vi) An order filing or refusing to file an award in an arbitration without the intervention of the High Court;*
- (vii) An order under section 95 of the Civil Procedure Code, 1966 which relates to the award of compensation where an arrest or temporary injunction is granted;*
- (viii) An order under any of the provisions of the Civil Procedure Code, 1966, imposing a fine or directing the arrest or detention in the civil prison, of any person except where the arrest or detention is in execution of a decree;*
- (ix) Any order specified in rule 1 of Order XLIII in the Civil Procedure Code, 1966 or in any rule of the High Court amending or in substitution for the rule;*

From the above, the order which the appellant intends to challenge is not among the orders listed in the aforementioned section. Since the order is not expressly mentioned, it has been excluded - **expressio unius, exclusio alterius est.** We agree with Mr. Kamara that leave is required. And indeed the case of **Alawi** is on all fours with this case.

The preliminary objection raised is meritorious. We sustain it. We strike out the appeal with costs. Since the matter was not complicated, we certify costs for one counsel. Order accordingly.

DATED at DAR ES SALAAM this 3<sup>rd</sup> day of February, 2009.

E.N. MUNUO  
JUSTICE OF APPEAL

E.A. KILEO  
JUSTICE OF APPEAL

B. M. LUANDA  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

P.B. KHADAY  
**DEPUTY REGISTRAR**