

IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM

(CORAM: OMAR, J.A., MNZAVAS, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 45 OF 1994

BETWEEN

MWAKA MUSA ..... APPELLANT

AND

SIMON OBEID SIMCHIMBA ..... RESPONDENT

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

(Rubama, J.)

dated the 30th day of April, 1991

in

Civil Revision No. 5 of 1989

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JUDGMENT OF THE COURT

LUBUVA, J.A.:

This matter arises from Probate Cause No. 62 of 1989 in the Resident Magistrate's Court of Dar es Salaam at Kisutu. In that Probate Cause, the appellant, MWAKA MUSA, was appointed the administrator of the estate of the deceased, one MWAJUMA BINTI MARIJANI who had died in 1967. SIMON OBEID SIMCHIMBA, the respondent in these proceedings unsuccessfully objected on the ground that the application for probate was time barred. Thereafter, the matter was brought up before the High Court (Rubama, J.) as Civil Revision Cause No. 5 of 1989. On revision, the appointment of the appellant was revoked. Dissatisfied with the decision of the High Court, the appellant was granted leave in terms of the provision of section 5 (1) of

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Appellate Jurisdiction Act, 1979 to appeal to this Court. This appeal was, as a result lodged with a certified point of law whether the law has prescribed any limitation period in respect of applications for the appointment of administrators and in particular, the import of Rule 3 of the Probate Rules.

The appellant was represented by Mr. Maira, learned Counsel and Mr. Mselem, learned Counsel advocated for the respondent. Although four grounds of appeal had been filed, at the hearing of the appeal, Mr. Maira argued only grounds one and two together. Forcefully, Mr. Maira submitted that the matter was wrongly brought before the High Court on revision. The reason for this he stated, was that as the Chamber Application for revision was based on section 43 (2) of the Magistrates' Courts Act, 1984, section 79 (2) of the Civil Procedure Code and section 3 of the Probate and Administration Ordinance, (Cap. 445) which prescribe circumstances for revision by the High Court, there was no basis upon which the probate proceedings were called for revision and the revocation of the grant of probate to the appellant. Referring to the provisions of section 43 (2) of the Magistrate's Courts Act, 1984, Mr. Maira charged that the learned judge erred in law in entertaining the application for revision because, the matter is not authorised by law to be entertained by the High Court on revision. He cited section 43 (2) of the Magistrates' Courts Act, 1984 which provides:

- (2) "Subject to the provisions of any law for the time being in force, all appeals, references, revisions and similar proceedings from, or in respect of, any proceeding of a civil nature in a district court or a court of a resident magistrate which are authorised by law shall lie to and be heard by the High Court". (emphasis supplied).

On the basis of this provision, Mr. Maira, learned Counsel for the appellant submitted that the revisional powers of the High Court in relation to proceedings originating in the District Court or Courts of Resident Magistrates are restricted to matters which are authorised by law. In this case, Mr. Maira stressed the law which authorises the High Court to exercise revisional powers is set out under section 79 of the Civil Procedure Code. This section provides:

- (1) "The High Court may call for the record of any case which has been decided by any court subordinate to the High Court and in which no appeal lies thereto and if such subordinate court appears -
- (a) to have exercised a jurisdiction not vested in it by law; or
  - (b) to have failed to exercise a jurisdiction so vested; or

- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity

the High Court may make such order in the case as it thinks fit.

- (2) Nothing in this section shall be construed as limiting the High Court's power to exercise revisional jurisdiction under the Magistrates' Courts Act, 1963".

From this, Mr. Maira enthusiastically submitted, neither of the sub-clauses (1)(a), (1)(b) or (1)(c) was applicable to the instant case. That is, the Resident Magistrate's Court Dar es Salaam at Kisutu could not be said to have exercised a jurisdiction not vested in it or to have failed to exercise a jurisdiction vested in it or to have exercised its jurisdiction illegally. In that situation, Mr. Maira urged, it was wrong for the High Court to invoke revisional jurisdiction under section 43(2) of the Magistrates' Courts Act, 1984 in a matter which the law under section 79 of the Civil Procedure Code did not authorise.

Responding to this submission, Mr. Mselem, learned Counsel for the respondent likewise, with zeal submitted that the High Court has wide revisional powers under section 43 (2) of the Magistrates' Courts Act, 1984. Referring to the provision of section 44 (1)(b) of the Magistrates' Courts Act, 1984 and the affidavit of the

respondent in this appeal who was the applicant before the High Court, Mr. Mselem urged that as there were errors pertaining to the application of the Law of Limitation Act, 1971, the High Court was properly moved to exercise its revisional jurisdiction in order to correct the errors.

On these submissions which relate to ground one, we wish to make it clear from the outset that the main issue before us is whether the learned judge exercised the revisional jurisdiction in terms of the law. It is common ground that sections 43 (2) of the Magistrates' Courts Act, 1984 and 79 of the Civil Procedure Code are the applicable provisions of the law governing revisional jurisdiction by the High Court. These, we are settled in our minds, should be read together in order to appreciate their import. With respect, Mr. Mselem's submission that these provisions are mutually exclusive is not correct. From the provisions of section 43 (2) of the Magistrates' Courts Act, 1984, it is clear that the High Court's revisional jurisdiction in respect of proceedings of a civil nature from a court of a resident magistrate can only be invoked in matters which are authorised by law. In the instant case, as pointed out by Mr. Maira, we agree with him that neither of the circumstances covered under section 79 (1)(a), (b) and (c) of the Civil Procedure Code is applicable. In Probate Cause No. 62 of 1989 before the Resident Magistrate Court of Dar es Salaam at Kisutu, we think

the court was properly vested with jurisdiction to adjudicate. The court cannot be said to have exercised a jurisdiction not vested in it or that it acted in the exercise of its jurisdiction illegally. In that case, it seems to us that the learned judge revised the probate proceedings under section 79 (1) of the Civil Procedure Code on grounds which are not applicable. We accept Mr. Mselen's submission that the High Court has wide powers of supervision and revision but with respect, we are not persuaded that these powers are limitless. The powers though wide, are nonetheless to be exercised in circumstances that are not only relevant but prescribed under the very law that provides for revision. In this case, we are firmly convinced that the circumstances under which the revision was carried out are not the circumstances envisaged under that section. They are inapplicable.

Mr. Maira also seriously criticised the learned judge in effecting the revision on the ground that the trial magistrate (Magesa, PRM) had failed to consider the application of the Law of Limitation Act, 1971. On this, the learned judge said:

"Having gone through the record, I hold that the trial court has failed to observe the provisions of the Law of Limitation Act, 1971 ..."

From this we are respectfully in agreement with Mapigano, J. who, among others, certified that a point of law was involved connected with the Law of Limitation. That is, whether the law has prescribed any limitation period in respect of applications for the appointment of administrators in probate matters. As shown in Part III of the first Schedule to the Law of Limitation Act, 1971, applications pertaining to suits have limitation periods as set out therein. However, the situation is different in regard to probate and administration causes. We agree with Mr. Maira's submission that in view of section 31 (1) of the Probate and Administration Ordinance, Cap. 445 the Law of Limitation Act, 1971 is not strictly applicable in matters of probate. In that section, it is provided that in any case where probate or administration is for the first time applied for after expiration of three years from the death of the deceased, the petition shall contain a statement explaining the delay. With respect, the learned judge was in error in holding that the trial court did not observe the provisions of the Law of Limitation Act, 1971 in revising Probate Cause No. 62 of 1989.

Finally, reference was also made to section 3 of the Probate and Administration Ordinance. Incidentally, as already pointed out, the Chamber Application filed before the High Court for revision by the respondent was based on section 3 of the Probate and Administration Ordinance.

In addition, sections 79 (2) of the Civil Procedure Code and 43 (2) of the Magistrates' Courts Act, 1984 were also cited. While dealing with ground one, we have endeavoured to explain that section 43 (2) of the Magistrates' Courts Act, 1984 could only be invoked in proceedings which are, in terms of section 79 (1) of the Civil Procedure Code authorised by law. In the instant case, we have held that the grounds on which the revision was carried out are not applicable to any of the situations set out under section 79 (1)(a), (b) and (c) of the Civil Procedure Code. And so the circumstances under which the revisional jurisdiction could be exercised under section 79 (1) (a), (b) and (c) of the Civil Procedure Code being inapplicable to this case, section 3 of the Probate and Administration Ordinance which provides for the jurisdiction of the High Court in probate and administration causes could not as correctly submitted by Mr. Maira, learned Counsel for the appellant be invoked. We are unable to agree with Mr. Msalem's counter submission that section 3 of the Probate and Administration Ordinance could be invoked by the High Court in its revisional powers because the High Court has wide powers.

For these reasons, we allow the appeal with costs. The High Court decision in Civil Revision No. 5 of 1989 is set aside and it is ordered that the Resident Magistrate Court's decision in Probate Cause No. 62 of 1989 is restored. It is so ordered.

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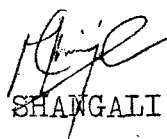
DATED at DAR ES SALAAM this 6th day of November, 1995.

A. M. A. OMAR  
JUSTICE OF APPEAL

N. S. MNZAVAS  
JUSTICE OF APPEAL

D. Z. LUBUVA  
JUSTICE OF APPEAL

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

  
( M.S. SHANGALI )  
DEPUTY REGISTRAR