

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

PC CIVIL APPEAL NO. 05 OF 2019

(C/f Probate Appeal No. 1 of 2017, District Court of Rombo at Rombo Original Shauri
la Mirathi Na. 10/2015)

ALBERT ELIGI SHIRIMA APPELLANT

VERSUS

KIZITO ELIGI SHIRIMA..... RESPONDENT

25th June, 2020 & 14th August, 2020

JUDGMENT

MKAPA, J:

This appeal originates from Mengwe Primary Court (trial court), in **Probate Cause No. 10 of 2015** relating to administration of estate of the late Baltazary Merinyo Shirima who died in 1998. The parties are blood brothers and sometime in 2015 the appellant applied for and was granted letters of administration by the trial court in respect of the above named deceased's estate.

It was alleged that the procedure for appointing the appellant at a family meeting was faulted hence the respondent appealed in the District Court of Rombo at Rombo (1st appellate court) vide **Application No. 6 of 2015** praying for the court to revoke appellant's appointment. The appellate court stuck out the



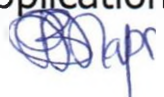
application on the ground that the court with jurisdiction to revoke letters of administration is the same court which granted. The respondent applied for revocation at the trial court but the court dismissed the claims. Aggrieved, he appealed to the 1st appellate court in **Appeal No. 1 of 2017** where the appellant herein raised preliminary objections on point of law to the effect that, the appeal was time barred and the court was not properly moved to determine it.

The 1st appellate court sustained the objection as the appeal was filed 45 days after the decision was made. The appeal was struck out with no orders as to costs hence the present appeal on the ground that:-

The magistrate erred in law and in fact by striking out the appeal instead of dismissing the same.

Parties agreed that the appeal be heard by way of filing written submissions. The appellant was represented by Mr. Elimringi Shirima (learned Advocate) while the respondent appeared in person.

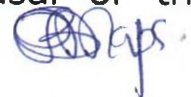
Arguing in supporting of the appeal Mr. Shirima submitted that considering the history of the case, the case had been pending in court for quite a while thus the magistrate ought to have dismissed it instead of striking it out. He went on arguing that it was the third time the respondent was re-filing the application



after being struck out. To support his argument, Mr. Shirima cited the case of **Chief Executive Faidika Ltd V Lydia Pius**, Revision No. 18/2013 HC Lab. Div at Shinyanga which discouraged refiling of applications after being struck out.

It was Mr. Shirima's argument that, having determined by the court, the fact that the appeal was time barred it was as good as no appeal existed thus, the court ought to have ordered dismissal. To support his argument he cited the case of **Hashim Madongo & Others V Minister for Industries and Trade & 2 Others**, Civil Appeal No. 27 of 2003 and **Ngoni Matengo Cooperative Marketing Union Ltd V Alimahomed Osman** (1959) EA 577 which observed that proceedings instituted after prescribed time ought to be dismissed and not struck out. He finally prayed for this court to allow the appeal.

Disputing the appeal, the respondent submitted that, the decision by the appellate magistrate to struck out or dismiss the application depends on the nature and merit of the case. He went on explaining that since this case involved blood brothers dismissing the same would have been unfair and would have caused irreparable damage to the deceased family thus the court made the right decision in striking it out instead of dismissing. He finally submitted that the 1st appellate court has discretionary powers to decide what it deems fit upon perusal of the



proceedings. He finally prayed for the court to dismiss the appeal. There was no rejoinder.

Having considered both parties arguments for and against the appeal, I think now the question for consideration is:-

Whether the 1st appellate court erred in striking out the appeal after sustaining the preliminary objection that the appeal was time barred.

The law is well settled when decision is before a court on whether to struck out or dismiss it. In the case of **Ngoni Matengo Cooperative Marketing Ltd Vs Alimahomed Osman** (*supra*), the defunct Court of Appeal of East Africa made the following statement of principle;

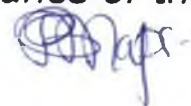
"...This court, accordingly, had no jurisdiction to entertain it, what was before the court being abortive and not a properly constituted appeal at all. What this court ought strictly to have done in each case was to "strike out" the appeal as being incompetent; rather than to have "dismissed" it, for the latter phrase implies that a competent appeal has been disposed of, while the former phrase implies that there was no proper appeal capable of being disposed of."



This principle has been consistently applied in numerous Court of Appeals' decisions to wit; **Cyprian Mamboleo Hizza V Eva Kioso and Another**, Civil Application No. 3 of 2010, **NIC and Another vs Shengena Ltd**, Civil Application No. 20 of 2007, **Hashim Madongo and Two Others V The Minister for Industry and Trade and Two Others** (supra), **Abdallah Hassan V Vodacom (T)**, Civil Appeal No. 18 of 2008 and **Thomas Kirumbuyo V TTCL Ltd** (supra).

Facing similar situation on whether to dismiss or struck out the application when the same is time barred, in **Mabibo Beer Wines & Spirits Ltd V Fair Competition Commission & 3 Others** (Civil Application No. 132 of 2015) [2018] TZCA 277, the Court of Appeal had this to say;

"We should pause here to observe, albeit en passant, that it will turn differently if the relevant legislation or Rules of the Court imposes, on the Court a duty or discretion to give a dismissal order with respect to a matter which has not been heard on the merits. A case in point is, for instance, Rule 63 (1) of the Rules which gives the Court a discretion to dismiss an application in the wake of the non-appearance of the applicant."



All said and done, we sustain the unopposed preliminary objection to the effect that the application is time barred. For the reasons we have belabored to canvass, we, accordingly, strike out the application but, since the sustained preliminary objection was raised by the second respondent alone, it is finally ordered that the application is struck out with costs to the second respondent."

The above authorities in my view suggest the fact that, court's discretion to dismiss or struck out a case depends on the nature and the stage which the case has reached at a particular time. In the above case the laws demand that cases which have not been heard on merit but incompetent for one reason or another and especially when they are time barred be struck out instead of dismissal.

The appeal at hand does not fall short of the above principles since the appellate magistrate after having sustained the preliminary objection that the appeal is time barred she struck out the same instead of dismissing it. I therefore hold that the appellate magistrate did not error in striking the appeal for being time barred as the same was yet to be heard on merit.



In the events I find this appeal is devoid of merit and proceed to dismiss it. Since the parties are blood brothers, I give no orders as to costs.

It is so ordered.

Dated and Delivered at Moshi this 14th day of August, 2020



S. B. Mkapa
S. B. MKAPA

Judge

14/08/2020