IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

PC. CIVIL APPEAL NO. 07 OF 2019

(Karatu District Court, Civil Appeal No. 16 of 2018, Original, from Primary Court Probate and Administration Cause No. 32 of 2018)

HILU SHAURI.....1ST APPELLANT

KASTULI SAFARI.....2ND APPELLANT

VERSUS

MOHE DARUS.....1ST RESPONDENT

BOSCO BURA.....2ND RESPONDENT

JUDGMENT

03/09/2020 & 27/11/2020

GWAE, J:

Before the Karatu Primary Court, the appellants herein above had petitioned for letters of administration of the estate of the late JOHN BASSORO KISIMBI vide Probate and Administration Cause No 32 of 2018. Before hearing of the petition, the respondents above entered a caveat (objection) dated 20th May 2018 through their advocates **Edward M. Kikuli** from Law Guards Advocates and subsequent to that there was another objection filed by on **Emmanuel Shio** from Ideal Chambers on 6th June 2018.

The respondents were basically objecting the sought grant of letters of administration in favour of the appellants as administrators of the estate of the late John Bassoro Kisimbi (deceased Hereinafter) who died on 16.01.2005. The respondents' basis for their objections was not only that they (respondents) are the lawful owners of part of the estate of the deceased intended to be administered by the appellants but also the petition is hopeless as it is time barred.

As the usual practice that, the objection proceeding has to be determined first, the trial court heard the respondents' objections and ultimately found the caveat to be meritorious and the petition was therefore dismissed with costs.

The appellants were dissatisfied by the decision of the trial court, therefore, they appealed to the District Court with a total of twelve (12) grounds of appeal. In determining the appeal, the first appellate Magistrate framed two issues out of the twelve grounds of appeal; to wit; (i) whether the trial Magistrate was wrong in computation by not having considered the fact that old probate existed before current probate, (ii) whether the current probate was hopelessly time barred. After deliberation of the issues, the first appellate court dismissed the appeal for being time barred.

The appellants are now before this court as a second appellate court armed with a total of eight grounds of appeal which I find it apposite to reproduce them hereunder;

i. That, the honourable District Magistrate grossly erred in law and in fact by not finding that there was no valid objection before Primary Court.

ii. That, the Honourable District Magistrate grossly erred in law and in fact by basing his decision on the decision of the High Court in Probate and Administration Appeal No. 01 of 2015.

iii. That, the Honourable District Magistrate grossly erred in law and in fact by finding that the Primary Court Probate and Administration Cause No. 32 of 2018, was time barred.

iv. That, the Honourable District Magistrate grossly erred in law and in fact by disregarding High Court decision in PC. Civil Appeal No. 09 of 2014, without stating reasons.

v. That, the Honourable District Court Magistrate grossly erred in law and in fact by framing two issues instead of answering the grounds of appeal.

vi. That, the Honourable District Court Magistrate grossly erred in law and in fact by finding the appellants' submission a lie as regards computation of time when the appellants were engaged in other suits.

vii. That, the Honourable District Court Magistrate erred in law and in fact by finding that the Primary Court Probate and Administration Cause No. 43 of 2005, was dismissed and had nothing to reflect on filing of the new Probate and Administration Cause No. 32 of 2018.

viii. That, the Honourable District Court Magistrate grossly erred in law and in fact by not making proper analysis of appellants' written submission and the Primary Court decision and thus arriving into a wrong and unfair decision.

When this matter was called on for hearing, both appellants enjoyed legal representation from their respective learned counsel, namely; **Mr. E. Safari** and **Mr. Qamara** of Prime Attorneys for the appellants and **Mr. John Materu,** from Materu & Co. Advocates for the respondent. With the leave of the court the appeal was disposed of by way of written submissions, and the parties' counsels filed their respective submissions as directed by the court.

Having considered the submissions by the parties together with the lower courts' records, I propose to start with the first ground of appeal. From this ground of appeal this court had to ask itself a question as to whether there was a valid objection/caveat before Karatu Primary Court. The answer to this question had to take me back to the records of the trial court in particular on the two caveats that were filed before the court of first instance.

Before the trial court there were two caveats filed on behalf of the respondents. The first caveat dated 20th May 2018 was drawn and filed by Mr. Edward E. M. Kikuli advocate from Law Guards Advocates with instructions from the respondents, again the second caveat dated 06th June 2018 was drawn and filed by Mr. Emmanuel Shio Advocates from Ideal Chambers Advocate with instruction from the respondents. Reading from the above caveats it suffices to say that it was the respondents' advocates who filed the two caveats before the trial court.

It should be remembered that the trial court in this case is Karatu "Primary Court" where advocates under section 33 (1) of the Magistrates' Courts Act Cap 11 R.E 2019 are precluded from entering appearance or acting on behalf of the clients. Section 33 (1) reads as follows;

> 33.-(1) No advocate or public prosecutor as such may appear or act for any party in a primary court.

I appreciate the recognition of this anomaly by the trial Magistrate where he admitted that indeed advocates are not allowed to appear in primary courts and documents filed on their behalf are useless and not subject for consideration by the court. For easy of reference I wish to quote that part of the judgment;

> "Pamoja na kwamba wapingaji wameeleza mambo mengi katika kupinga mirathi hii, mimi sioni sababu ya kurudia kila kitu walichokilalamikia katika barua zote mbili, barua ya kwanza ya tarehe 20/05/2018 na nyingine ni barua ya tarehe 05/06/2018 ambazo barua zote ziliandikwa na ofisi za mawakili wa kujitegemea ambao kwa mujibu wa sheria hawaruhusiwi kusimama katika mahakama za mwanzo wala maelekezo yao hata kama yangekuwa na mashiko kisheria yasingeweza kufanyiwa kazi na mahakama ya mwanzo."

However, despite the acknowledgment of the above irregularity, the trial court Magistrate proceeded to determine the objection proceeding basing on the oral evidence of the respondents, where he stated that;

> "Pamoja na kuwepo pingamizi hizo kwa barua za mawakili wa wapingaji Edward E. M. Kikuli wa Law Guards Advocate na bwana Emmanuel Shio wa Ideal Chambers, mahakama pia imesikiliza Ushahidi wa wapingaji wenyewe Pamoja na Ushahidi wa waombaji, ambao ndio utakuwa ni msingi wa uamuzi wa Mahakama hii juu ya pingamizi hizi."

It is at this juncture that I concur with the appellants' counsel that there was no valid objection or caveat before the trial court worthy for consideration. As stated in the judgment, the trial Magistrate was quite correct to have stated that the caveats having been filed by the advocates were as good as nothing to prompt the court to have them determined. To my firm interpretation of the above holding of the trial magistrate is that since the caveats were filed by incompetent people before the trial court it suffices to say that there was no any objection/caveat filed before the court, thus the court had nothing more to resolve except the appellants' petition.

The act of the trial Magistrate to continue with the determination of the objection basing on the evidence is quite a gross misdirection. One may ask that if the trial Magistrate disregarded the caveats filed how did he proceed to determine the evidence whose basis is on the caveats? The answer would have been otherwise had the trial Magistrate omitted the caveats and directed the parties (respondents) to address the court on the caveats/objections and proceed to determine the same. Failure of that, this court is justified to find that there was

no valid objection before the court of the first instance for its determination, the trial court entertained a non-existing objection/caveat.

Nevertheless, if I were to determine the respondents' objection yet the said objection particularly the respondents' assertion that, part of the deceased's estate is their property which they purchased from deceased's daughter one Regina John Kisimbi, is baseless since the same is only entertainable by a court or land tribunal of competent jurisdiction when the appellants would or will be in a process of including it as part and parcel of the deceased's estate. Otherwise the consent judgment of the District Land and Housing Tribunal dated 30th September 2017 would be into applicability.

The issue as to whether the respondents had an interest or not in the deceased's properties and they had actually purchased part of the estate subject of the sought administration would not be justly raised to object the appellants' petition for grant of letters of administration.

Having found as herein above, it is now pertinent to ascertain if the petition for grant of letters of administration no. 32 of 2018 filed by the appellants was time barred. I am alive of the Law of limitation Act, Cap 89, R. E, 2002 that a dispute filed ought of time ought to be dismissed in order to ensure that litigants do not come to courts seeking redress on the time of their own choice. As rightly observed and admitted by the learned Resident Magistrate (Hon. Kuppa) there has

been serious lacuna when it comes to an issue as to a prescribed period within which a petition for grant of letters of administration may be presented for filing in the Primary Courts. The law applicable in the primary courts for limitation of time is Probate Rules, GN. 311 of 1964 and in District Courts, Resident Magistrates' Court and the High Court are Probate and Administration Act, Cap 352 2002. The 1st appellate magistrate relied on the decision of this court (Nyangarika, J) in **Ramadhani Said and 2 others v. Mbaraka Abasi,** Probate and Administration Appeal No, 1 of 2015 (unreported) to hold that the appellants' petition was time barred since it was to be filed within 60 days from the date of the deceased's demise as was the case before the trial court.

I agree that the delay to file a probate and administration must pertain with explanation as requirement is mandatory as provided for under section 31 (1) of the Probate and Administration Act (supra) and interpreted by the Court of Appeal in **Mwaka Musa v. Simion Obeid Simchimba,** Civil Appeal No. 45 of 1994 (unreported) where the petition was found to have been filed after lapse of 33 years whereas the law requires filing of the same before lapse of three years from the date of deceased's death however the present matter originates from primary court where the Act (supra) is not applicable as per its preclusion under section 92 of the Act. Hence Cap 352 is not applicable in the circumstances. I thus find myself bound to join hands with my learned brother Mruma in his lordship holding

in **Majuto Juma v. Issa Juma**, PC. Civil Appeal No. 9 of 2014 (Unreported) where it was held that no specific period in filing petition for probate and administration as provided under Rule 5 of GN. 311 of 1964, Customary Law (Limitation of Proceedings), Rules which judicially interpreted by this court (**Mwalusanya, J**) in the Case of **Kabuya s/o Essore vs. Nturi Nyegere**, (1989) TLR 172 W=where it was stated that;

> "Under Rule 5 of GN. 311 of 1964, Customary Law (Limitation of Proceedings), Rules no specific period of limitation is laid down. In the case of a claim of head of cattle but prudence requires that there should be no unwarrantable delay in bringing such proceedings..... The question as to whether the delay is unwarrantable is a question of fact. In the case at hand the delay was for some 17 years. No explanation has been given by the respondent for this delay. In my considered view, the delay is quite inordinate, and therefore the trial court should have rejected the claim"

Nevertheless, it is evident from the record when the former petition (43 of 2005) was promptly filed by one **Hamay Kisimbi** and **Aloyce John** however it was struck for being incompetent on 13/06/2013 but there was another case Probate and Administration Cause No. 20 of 2012 that was subsequently filed before the trial court followed by a revision application filed in the district court vide Civil Revision No. 8 of 2012 and the fact that the respondents and one Regina

John Kisimbi filed a land dispute in the District Land and Housing Tribunal vide Application No. 13 of 2013 which was decided on 24/11/2017.

Considering the pendency of the cases mentioned above before the courts below and in the District Land and Housing Tribunal of Karatu at Karatu, the statutory preclusion clause or exclusion clause ,in the computation of period in filing the appellants' petition would apply since the respondents were party to the proceedings in Land Application No. 13 of 2013. The lower courts' proceedings, to my view, are self-explanatory to justify an invocation of section 22 (1) of the Law of Limitation Act excluding days the matter had been in court, Cap 89, Revised Edition, 2002 taking into account that the documents necessary for explanation were filed including minutes of the family meeting held on 21/04/2018, ruling of the trial court vide Probate Cause No. 43 of 2005 dated 13th June 2013, appellants' reply letter to the respondents' advocates' complaints letters and other documents.

I have also considered the ruling of Hon. Mkama via revision application no. 3 of 2012 and found to be tainted with apparent irregularity is, an order directing that the filing of Probate and Administration No. 20 of 2012 was a duplicity as the same would have been dealt with in Probate and Administration Cause No. 43 of 2005 while the same was struck out accordingly on 13/6/2013 by the trial court (**Hon. Kimario-RM**). Therefore, by virtue of s. 44 (1) of the Magistrates Courts

Act, Cap 11 Revised Edition, 2019, I hereby quash and set aside the order of the district court of Karatu at Karatu dated 30th March 2013.

As the appellants expressly stated that, if granted letters of administration they will administer the deceased's estate which have not been administered leave alone the farms whose determination was made by the DLHT, this position is reflected in the trial court proceedings and for easy of reference page 14 of the typed proceedings is reproduced herein under;

> "Mali inayozungumziwa kwenye marithi hii sio mashamba pekee kama walivyodai wapingaji, kwani kuna manyumba hapa karatu mjini, 1 na Gongali nyumba mbili, kuna baiskeli, mifugo... kama tulivyoteuliwa na familia".

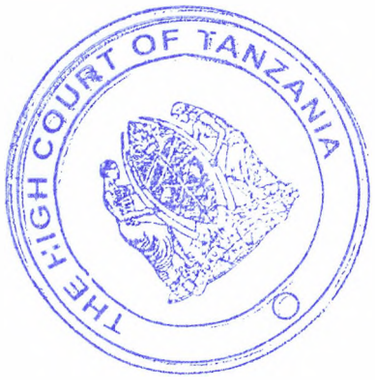
In the light of the above findings and requirement to dispense justice expeditiously I find no justifiable reason to deny grant of letters of administration to the appellants.

Before I put my pen I would wish to urge that a family may hold different family meetings as far as appointments of administrators is concern since an appointed administrators may cease or may die before completion of his duty or may not be eligible to further administer an estate for various reason or on an event which will inevitably lead to conveying of another clan or family meeting for appointment of an administrator. Thus, the finding of the trial magistrate that, the subsequent family meeting held on 21/4/2018 was void due to existence of the

former clan or family meeting is a total misdirection to the facts surrounding the case.

Consequently, the trial lower courts' concurrent judgments are hereby quashed. The appellants' appeal is hereby allowed. For the interest of justice, the appellants are granted letters of administration of the estate of the deceased, **John Bassoro Kisimbi**. They are directed to administer the estate in accordance with the law. Each party shall bear costs of this appeal and those at the lower courts

Appeal allowed.



M.R. GWAE
JUDGE
27/11/2020