

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

PC CIVIL APPEAL NO. 29 OF 2021

*(C/F Probate and Administration appeal No. 29 of 2020 in the District Court of
Arumeru Originating from the Decision of Maji ya Chai Primary Court in Probate
cause No. 14/2020)*

STEPHANO SALUAAPPELLANT

VERSUS

NAITOWAKI SALUA RESPONDENT

JUDGMENT

02/05/2022 & 04/07/2022

KAMUZORA, J.

Before the Primary Court of Maji ya chai at Arumeru the Respondent vide Probate Cause No. 14/2020 petitioned for the grant of letters of administration of her late father one **Salu Ichumba Mungure**. The Appellant objected the Respondent's appointment on account that he was not involved in the family meeting that appointed the Respondent and that, there was no any property of the deceased to be administered.

The trial court after hearing both the petitioner and the objector overruled the objection and proceeded to appoint the Respondent as the administratrix of the estate of the late Salua Ichumba Mungure. The

Appellant was aggrieved by the trial court's ruling but unsuccessfully appealed to the district court of Arumeru in Probate and Administration Appeal No. 29 of 2020. Three issues were raised before the district court as follows: -

- 1. That, the trial court erred in law by confirming Naitowaki Salua as an administratrix of the estate of Salua Ichumba Mungure while there was no valid meeting which appointed her.*
- 2. That, the property (land) involved in the estate of Salua Ichumba Mungure does not form party of his estate.*
- 3. That, the trial Court erred in law when it failed to consider the time which had lapsed since when Salua Ichumba Mungure died.*

The district court found the appeal to have no merit and dismiss it.

From the decision of the district court the present appeal was preferred on the following grounds: -

- 1. That, the Appellate Court erred in law and fact by dismissing the Appeal than allowing the same to the extent so far stated by the appellate court as there was crucial issue discussed by the appellate court warranting the appeal to be allowed.*
- 2. That, both the trial court and the appellate court failed to consider time which had lapsed since when Salua Ichumba Mungure died up to the time when probate application was*

instituted as such a delay was not accounted for hence reaching into erroneous conclusion.

As a matter of legal representation, the Appellant was dully represented by Mr. Amani Jackson Nyari while the Respondent was well represented by Ms. Agripina Christian, Counsel from TAWLA. The counsel for the parties opted to argue the appeal by way of written submissions.

Submitting in support of the first ground of appeal, the Appellant's counsel argued that, one of the issues raised and argued on appeal before the district court was the property (land) which was involved in the estate of Salua Ichumba Mungure. That, an objection was raised that the said land did not form part of the deceased estate and that it was wrongly involved.

That, the first appellate court was of the view that the disputed property cannot be distributed while there is a conflict. It reasoned that, as the proper tribunal must declare whether the property was the property of the deceased or not.

The Appellant's counsel submitted that, in the year 2017 the Respondent instituted an application against the Appellant claiming to be the owner of the same land and however the Appellant appealed to the District Land and Housing Tribunal of Arusha in Appeal No. 87/2017.

That, in year 2018 the Respondent and her other sisters instituted Application No. 233/2018 at the District Land and Housing Tribunal against the Appellant claiming the same land to be given to them by their late deceased parents and the application was dismissed. That, the findings of the district court were enough to warrant the appeal to be allowed as the Appellant had advanced reasons before the trial court during the objection and on appeal before the district court. The counsel for the Appellant contended that, the appeal ought to be allowed as the property which was involved into the deceased estate did not form part of his estate.

Submitting on the second ground the Appellant argued that, both the trial court and the appellate court failed to consider the time which had lapsed since Salua Ichumba Mungure died up to the time when probate application was instituted as such the delay was not accounted for hence reaching in to erroneous conclusion.

The Appellant further submitted that, it was in 1986 when Salua Ichumba Mungure died thus, the probate matter was filed by the Respondent 34 years later. That, despite the Appellant's objection to the time, the Respondent did not give reasons for the delay and the trial court granted to the Respondent the letters of administration. While the

Appellant is aware that a probate matter can be filed whenever necessary need arise, he was of the view that the delay has to be accounted for. In support of his submission, he cited the case of **Masanja Luponya Vs. Eliasi Lubinza Mashili**, PC Probate Appeal No 01/2020 HC at Shinyanga (unreported), **Majura Songo Nyekaji**, Probate Administration Cause No. 03/2019 HC at Mwanza (Unreported).

The Appellant insisted that, 34 years delay to file the probate cause by the Respondent is extreme delay which needed explanation and yet, the Respondent did not explain and account for such delay. He was of the view that, the Respondent's application was incompetent and the trial court lacked jurisdiction to entertain the same. The Appellant thus prays for the appeal to be allowed.

In reply submission the Respondent submitted on the 1st ground of appeal that, the Appellants argument in this point solely based on the judgment of the District Land and Housing tribunal in Appeal No. 87/2017 and in Application No. 233 of 2018. She submitted that, the land sought to be administered is a different land from that was litigated in the above two cases. That, the said land that was disputed in those two cases was bequeathed to the Respondent and her sisters long time ago thus could not be part of the estate to be administered. That, even

the two cases; Appeal No 87 of 2017 and Application No. 233/2018 before the district land and housing tribunal did not give any right to the parties thus the Appellant could not claim right based on the two mentioned cases.

Replying to the 2nd ground of appeal the Respondent submitted that, the Appellant had an opportunity to object on the issue of time but he did not do so hence claiming it at an appeal stage is an afterthought. That, had the Appellant raised this issue on the trial stage then, the Respondent would have time to answer the same. She added that, the Appellant in his submission did not state the time limit within which to file a probate matter as the Primary court Rules as well as the Law of Limitation Act 1971 are both silence on the time limit to file a probate matter. She maintained that, the time to file a probate matter accrues when one finds it necessary to apply for administration as it was the case in this matter. It is the prayer by the Respondent that, this court find the grounds appeal baseless and devoid of merit and dismiss the entire appeal.

In a brief rejoinder the Appellant reiterated the submission in chief and added that, although the Respondent claims that the property in this probate cause is not the same as the one involved in the appeal,

she did not give the description of the land subject to appeal and the land subject to the probate matter. Regarding the issue of time limit to file a probate matter he submitted that, ground number three on the caveat filed at the trial court was all about the time from the demise of Salua Ichumba Mungure and the time of filing the probate No. 14/2020. He urged this court to go through the trial court records to verify such facts being guided by the decision in the cases of **Helen Adam Elisha @ Hellen Silas Masui Vs Yahaya Shabani & another**, Civil Application No. 118/01 of 2019 CAT at Dar es salaam (Unreported) and **Halfani Sudi Vs Abieza Chichili** [1998] TLR 527 which stated that, the court records are deemed authentic and cannot easily be impeached.

I have considered the arguments by the parties and evidence in records. On the first ground, it is the contention by the Appellant that the 1st appellate court erred for not considering that there is no any estate left by the deceased to be administered by the Respondent in the probate matter. I understand that the Primary Court is vested with powers to appoint administrator of estate by virtue of by sub-paragraphs (a) of Paragraph 2 of the Fifth Schedule to the MCA. Under that provision, the primary court can either on its own motion or upon an

application, appoint one or more persons "interested in the estate of the deceased" to be the administrator or administrators thereof. The primary consideration, therefore, is holding of an interest either beneficial interest or even credit interest in the estate of the deceased. It is evident from the record of the trial court that the Respondent is the child of the deceased hence has beneficial interest and can apply to appointed as an administratrix of the estate of her deceased father.

It was the contention by the Appellant that there was no need for appointment of the Respondent as an administratrix of the estate as the plot in dispute did not form part of the estate of the deceased and no estate left by the deceased to be administered. However, the Respondent believes that the land in question forms part of the deceased estate. This imply that, there is a dispute over the ownership of the property to which does not bar a party from instituting a probate cause and or the appointment of an administrator of the deceased estate. This is because, in order to determine the issue of ownership, there is a need to appoint an administrator of the estate of the deceased who will stand as deceased representative.

As it was rightly held by the first appellate court as well as the trial court that, if there exists dispute in relation to the property then, any

aggrieved party can file a dispute in respect of that property and the same cannot be distributed unless and until the dispute is resolved. I reiterate that, whether or not a property forms part of the deceased estate is not a bar for appointment of the administrator of the estate, rather upon appointment of the administrator, a person challenging the inclusion of the property from the estate of the deceased can file a case against the administrator to challenge the ownership by the deceased. That will bar the administrator from including the disputed property in the deceased estate until the dispute is resolved. And if the dispute is resolved that the property belonged to the deceased, then the same will be included in the estate of the deceased to be administered by the appointed administrator.

Given the circumstances, I do not find any fault in the decision by the first appellate court upholding the decision of the trial court. I am thus satisfied that the appointment of the Respondent as the administrator of the estate of the deceased was made upon due consideration of the provisions of Paragraph 2 (a) of the Fifth Schedule to the MCA. In view of that, I find that the first ground of appeal in this matter is devoid of merit.

Reverting to the second ground of appeal the matter that need consideration of this court is whether there is time limit within which to file a probate cause. It is not in dispute that the deceased passed away on 14/07/1986 and on 4/3/2020 is when the Respondent knocked the doors of the trial court seeking for the appointment and grant of letters of administration. While the Appellant claim that the Respondent was bound to justify the delay, the Respondent believe that probate matters are not limited by the law.

The powers of the primary court in appointment of administrators of the estate are governed by the fifth schedule to the Magistrates Courts Act CAP 11 R.E 2019. Under that law, there are no time limit specified for the petitioning for probate or grant of letters of administration. The Appellant referred the decision in **Masanja Luponya**, (supra) and **Majura Songo Nyekaji**, (supra) the Respondent was supposed to account for the delay.

I understand that there is two school of thought over time limitation in Probate and administration matters. The position taken in the above two cases cited by the Appellant is that, although no specific period of limitation is laid down, there should be no unwarranted delay in bringing such proceedings and that there shall be a statement

explaining the delay supporting a petition if the petition is filed more than three years after the deceased's death.


The other position is found in **Majuto Juma Nshahuzi Vs Issa Juma Nshahuzi**, PC Civil Appeal No.9 of 2014 (HC), at Tabora (unreported), and **Hezron Mwakingwe Vs. Elly Mwakyoma**, Probate Appeal No. 3 of 2020 HCT at Mbeya (unreported) and **Essau Asjile Makosi Vs Otman Rebman Kyapokwa**, Probate Appeal No.10 of 2020, HC at Mbeya (unreported). The court in the above cases maintains that, there is no limitation of time since the law does not provide for the same.

I hold the second position that there is no specific provision of the law expressly providing for limitation of time in filing applications for letters of administration before the primary court. I understand that under Rule 31 of the Probate Rules, where probate or administration is for the first time applied for after expiration of three years from the death of the deceased, the provision requires the petition to contain a statement explaining the delay. The provision also gives powers to the court to require for further proof of the alleged cause of delay if it finds the explanation in the petition to be unsatisfactory. The Probate Rules does not govern the Primary court in probate and administration

matters. The primary court is governed by Fifth Schedule to the Magistrates Courts Act CAP 11 R.E 2019 which does not contain any provision on time limitation or the need to explain for the delay. Similarly, under the Law of Limitation Act no period is prescribed within which an application for grant of letters of administration must be made. In this see the Court of Appeal decision in **Mwaka Musa Vs Simon Obeid Simchimba**, Civil Appeal No.45 of 1994. Thus, the argument by the Appellant that the trial court and the appellate court failed to consider that there was a delay in filing the probate matter which was not accounted is baseless. I therefore find no merit in the second ground of appeal.

In the upshot the appeal is devoid of merit and its hereby dismissed. Considering the nature of this appeal, I make no orders as to costs.

DATED at **ARUSHA** this 04th day of July, 2022.


D.C. KAMUZORA
JUDGE
