

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

BUKOB A DISTRICT REGISTRY

AT BUKOB A

(PC) CIVIL APPEAL NO. 16 OF 2021

*(Arising from Probate Cause No. 08 of 2020 of Kayanga Primary Court and Karagwe District Court Civil
Revision No. 5 of 2021*

EDINA MFURUKI.....APPELLANT

VERSUS

GRACE MFURUKI.....RESPONDENT

JUDGMENT

07/02/2022 & 17/02/2022

NGIGWANA, J.

The appellant being aggrieved by the decision of the District court of Karagwe at Kayanga in Civil Revision No. 5 of 2021 arising from Probate Cause No. 8 of 2020 of Kayanga Primary Court, lodged this appeal. The Petition of Appeal contained seven (7) grounds of appeal, but for the purpose of brevity, clarity and avoidance of repetitions, they can be summarized into three grounds as follows: -

- 1. That the learned Magistrate erred in law and fact when admitted and entertained application for revision while the same was time barred.*
- 2. That the learned Magistrate erred in law to revoke the letters of the administration of the appellant while had no power to do so in law.*
- 3. That the learned Magistrate erred in law for failure to confine himself to the pleadings, hence erroneous decision.*

Wherefore, the appellant prays for the following orders: That the proceedings in Civil Revision No. 5 of 2021 be quashed and orders thereto be set aside. That the appointment of the appellant as administratrix of the estate of the deceased philemon Mfuruki be restored. Costs be provided for, and any other relief the court may deem just to grant.

The brief background which gave rise to this appeal can be simply stated as follows; The parties to this appeal are blood sisters of the same parents, Edina Mfuruki (Appellant) being the young sister while Grace Mfuruki (respondent) being the elder sister. Sometimes in 2012, they lost their beloved father. Following the demise of the said father, the appellant successfully petitioned for letters of administration of the Estate of the deceased in the Primary Court of Kayunga via Probate and Administration Cause No. 8 of 2020. The decision of the court was handed down on 21/04/2020. The appellant was further ordered to file with the court an inventory and accounts of estates within four (4) months pursuant to regulation 10(1) of the Primary Court Administration of Estates Rules, G.N No. 49 of 1971.

The inventory and accounts of estates were filed with the primary court of Kayunga on 18th day of February, 2021. It is almost ten (10) months from the date of the order. On that very date, Probate and Administration Cause No.8 of 2020 was marked closed. However, the primary court record is silent as to whether the appellant was granted extension of time to file an inventory out of four months provided by the law; but since it is not before the parties, I will not delve into it.

On 03/06/2021, the respondent filed application for revision against the decision of the Primary court of Kayunga. The same was registered as Civil revision No.5 of 2021. The same was argued by way of written submissions. After hearing both parties, the matter was decided in favor of the applicant, now respondent. Consequently, the appointment of the Appellant as the Administratrix of the deceased's estate was revoked on the major ground that her appointment was tainted with serious irregularities. The district court went a step ahead and ordered that one house and farm which were not part of the deceased's estate be handed over to the respondent. The appellant was aggrieved by the said decision hence this appeal.

At the hearing of this appeal, the appellant was represented by Mr. Raymond Laurent, learned advocate while the respondent was represented by Mr. Samwel Kiula, learned advocate. By consensus, the appeal was orally argued.

Arguing the first ground of appeal Mr. Raymond submitted that, the judgment of the Primary Court in Probate and Administration Cause No. 08 of 2020 was delivered on 21/04/2020 but Civil Revision No. 5 of 2021 was filed in court on 03/06/2021, that is to say, almost 15 months from the date of the decision of the primary court. He added that, the application offended Section 22(4) of the Magistrates' Courts Act Cap. 11 R: E 2019 which clearly states that revision to the District Court has to be filed within twelve (12) months from the date of the decision.

On his side Mr. Kiula submitted that, this is an appellate court therefore, it cannot deal with the issue time limitation which was not addressed in the district court. He made reference to the case of **Hotel Traventine Limited and 2 Others V. National Bank of Commerce Limited** [2006] TLR 133.

In his brief rejoinder Mr. Raymond, submitted that, this is the first appeal and, on that ground, this court is the first appellate court, thus the first ground was properly raised in the proper forum.

Having heard submissions of both parties in respect of the first ground of appeal, the issue for determination is whether Civil Revision No.5 of 2021 was time barred.

It is not disputed that the question of limitation of time is a point of law. The time limit set within which to institute proceedings in a court of law must be observed because there are consequences where proceedings are instituted out of time and without leave of the court. The first complaint in this appeal is that Civil revision No.5 of 2012 which was admitted and entertained by the district court of Karagwe was time barred.

It is trite law that the District Court is vested with revisional powers to call for and examine the record of any proceedings in the primary court established for the district for which it is itself established, for the purposes of satisfying itself as to the correctness, legality or propriety of any decision or order of the primary court **but it can only do so within twelve (12) months from the date of the primary court decision or order.**

Section 22(4) of the Magistrate Courts Act Cap. 11 R: E 2019 provides that;

*"No proceedings **shall** be revised under this section after the expiration of twelve months from the termination of such proceedings in the primary court---"*

As correctly stated by Mr. Raymond, learned advocate for the appellant, the decision of the primary court was delivered on 21/04/2020 but Civil Revision No. 5 of 2021 was filed in the District of Karagwe on 03/06/2021, therefore, it is obvious that the same was filed after the expiration of twelve (12) months from the date of the decision of the primary court, and no extension of time ever sought and obtained by the respondent before filing the same. No doubt that the herein above provision has been coached in the mandatory form following the use of the term "**shall**" therefore its compliance is not optional, as according to section 53(2) of the Interpretations of Laws Act Cap 1 R: E 2019, where in a written law, the word "**shall**" is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.

The argument by Mr. Kiula that this court being an appellate court has no room to deal with the issue of limitation of time, with due respect is a baseless and unfounded argument for two reasons; **one**; as regards this matter, this is a first appeal, and **two**, the question time limitation being a point of law, it can be raised at any stage in the proceedings including appeal.

In that premise, I shake hands with Mr. Raymond that the question of limitation of time was properly raised in this appeal as a ground of appeal. In the event, I find the 1st ground of appeal meritorious.

Arguing the 2nd ground, Mr. Raymond submitted that since in Probate and Administration Cause No. 8 of 2020 the inventory and accounts of assets were filed and as a result, the matter was marked closed, there was nothing to revoke. He made reference to the case **Ahmed Mohamed Allaamar Versus Fatuma Bakari and Another**, Civil Appeal No. 71 of 2012 CAT (unreported) where the Court of Appeal of Tanzania asked itself the question as to whether the Probate granted to the Appellant in 1972 was capable of being revoked or annulled via Misc. Application of 2007 taking into account that the appellant had already filed with the High Court the requisite inventory and account in 1987. In response to that question, the Court of Appeal had this to say;

"Given the fact that the appellant had already discharged his duties of executing the will, whether honestly or otherwise, and had already exhibited the inventory and accounts in the High Court, there was no granted probate which could have been revoked or annulled"

He further submitted that, even when there is a need to re-open probate proceedings, the application to re-open the same can only be lodged in the probate court, in our case, Kayunga Primary Court and not the District Court of Karagwe.

On his side, arguing the 2nd ground of appeal, Mr. Kiula submitted that, even where Probate and Administration Cause has been closed, it can be

re-opened upon application in the court which issued the letters of administration and where the court is satisfied that grounds for revocation have been demonstrated, it can proceed to revoke the appointment of the administrator/Administratrix. He made reference to Regulation 9 (c) and (d) of the Primary Courts (Administration of Estates) Rules, G.N No.49 of 1971 which states that; any creditor of the deceased person's estate or any heir or beneficiary thereof , may apply to the court which granted the administration to revoke or annul the grant where it is satisfied that **the proceedings to obtain the grant were defective in substance so as to have influenced the decision of the court or, the grant has become useless and in operative.**

On the other hand, Mr. Kiula conceded with Mr. Raymond, learned advocate for the appellant that the District Court had no jurisdiction to revoke the Appointment of the Appellant as the administratrix of the estate of the late Philemon Mfuruki. He made reference to these cases; **Beatrice Brighton Kamanga and Amanda Brighton Kamanga Versus Ziada William Kamanya**; Civil Revision No. 13 of 2020, HC – DSM, **Ruth Makune Versus William Festo Makune**; PC. Civil Appeal No. 61 of 2020 HC Mwanza, and **Rukia Amani Masalu (Administrator of the estate of the late Amani Masalu Magwambele Versus, the Late (Aman Masalu Magwambele (PC) Civil Appeal No. 15 of 2021 HC Mwanza (all unreported).**

In his brief rejoinder, Raymond urged the court to follow the interpretation given by the Court of Appeal in the case of **Ahmed Mohamed Allaamar (supra)** to see that when the Probate Cause is closed, revocation of the

administratrix/administrator of the deceased's estate is impossible because there is nothing to revoke.

Having heard both the learned counsel in respect of the 2nd ground of appeal the first issue for determination is whether the District Court of Karagwe had power to revoke the administration of the appellant?

Indeed, I am in accord with both learned counsel that the District Court of Karagwe went into an error in revoking the appellant's administration of the estate.

It is trite law that the primary court has jurisdiction to appoint an administrator but also power to revoke his/her appointment however, it can only revoke the said appointment after being moved by the objector who is supposed to prove to the satisfaction of the court that one of the following reasons has existed;

- (a) That the administration had been obtained fraudulently;*
- (b) That the grant had been made in ignorance of facts the existence of which rendered the grant invalid in law;*
- (c) That the proceedings to obtain the grant were defective in substance so as to have influenced the decision of the court;*
- (d) That the grant has become useless and in operative;*
- (e) That the administrator has been acting in contravention of the terms of the grant or willfully or negligently against the interests of the creditors, heirs or beneficiaries of the estate. **See***

Paragraph 2 of the Fifth Schedule to the Magistrates Courts Act, Cap 11 R: E 2019, and Regulation 9 of the Primary Courts (Administration of Estates) Rules, G.N No.49 of 1971.

The second issue for determination is whether, the closed probate can be re-opened by the court. According to Mr. Raymond, learned advocate for the appellant, the same cannot be re-opened, but Mr. Kiula, learned advocate for the respondent is of a different view. His view is that, the same can be re-opened and the court may proceed to revoke the appointment of the administrator/ administratrix of the deceased's estate.

It is trite law that there is no endless administration or a life administrator/administratrix in our jurisdiction. The matter comes to and end on filing of the inventory (**Form No. V**) and accounts of estate (**Form No.VI**) and after the order of the court closing the matter. See **case of Beatrice Brighton** (Supra). In the case at hand, Forms No. V and VI were duly filed with the Primary court of Kayunga on 18/02/2021, the matter was marked closed.

The law is very clear as discussed herein above that revocation of administration is only possible where the matter has not been closed. But, where the matter has been formally closed and the administrator is discharged, there will be no granted probate to be revoked. This position was stated by the Court in the case **of Ahamed Mohamed Al laamar** (Supra). This court being subordinate to the Court of Appeal, is bound by the said decision under the common law doctrine of *stare decisis* (doctrine

of precedent) which is part of our law. In such a situation, I hold that, application for revocation cannot be entertained. The phrase "**when it is done, is done**" becomes useful.

In the case of **Ahmed Mohamed Allaamar (supra)**, the Court of Appeal addressed the remedy which was available to the respondents. The court had this to say;

"one, If the respondents genuinely believe that the appellant acted in excess of his mandate or wasted the estate and/or subjected it to damage or occasioned any loss to it, through negligence, they are free to sue him,....two, if they are also convinced that he either fraudulently converted some properties forming part of the estate, and/or that he deliberately exhibited a false inventory or account, they are equally free to institute a criminal proceeding against him in accordance with the provisions of the governing laws"

Coming to the issue whether the proceedings can be re-opened for any other **compelling reason**, bearing in mind the doctrine of **functus officio**, it is my considered view that a probate estate may be re-opened after it has been closed and the administrator/administratrix has been discharged following discovery of new asset/assets of the deceased. For that matter, upon petition being filed by any interested party, the probate court may re-appoint the same administrator or a new administrator to administer the subsequent discovered estate. Once the reason for which the estate was re-opened has been handled, the estate must be once again

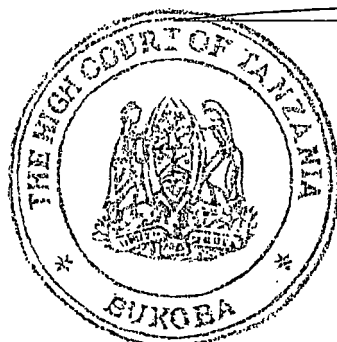
closed. In the case at hand, there was new asset discovered to warrant re-opening of the closed matter.

Now, being guided by the principle stipulated in the case of **Ahmed Mohamed Allaamar** (supra) the respondent, if genuinely believes that the appellant acted in excess of her mandate or that she has done an act or omission which has occasioned her any loss or damage, she is at liberty to sue her subject to law of limitation, and bearing in mind that, one of the cardinal principles of law relating to litigants is that everything must come to an end including probate matters. See **Juma B. Kadala versus Laurent Mnkande** [1983] TLR 103.

Since the determination of these two grounds suffice to dispose of the appeal, I find no compelling reason to deal with the third ground as doing so will be a mere academic exercise.

In the event and for the foregoing reasons, the appeal is found meritorious, and the same stands allowed. I proceed to quash and set aside the proceedings, decision and/or orders of the District Court of Karagwe in Probate Revision No.5 of 2021. Given to the nature of the appeal and the fact that the parties to this appeal are blood sisters of the same parents, I make no order as to costs.

It is so ordered.

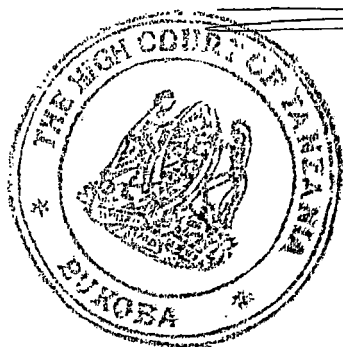


E.L. NGIGWANA

JUDGE

17/02/2022

Judgment delivered this 17th day of February, 2022 in the presence of the Appellant in person and his advocate Mr. Raymond Laurent, Mr. Samwel Kiula, learned Advocate for the respondent, Mr. E. M. Kamaleki, Judges' Law assistant and Mr. Antony Kithama, B/C.



E.L. NGIGWANA

JUDGE

17/02/2022