

**TIN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(IN THE DISTRICT REGISTRY OF SHINYANGA)**

AT SHINYANGA

PC CIVIL APEAL NO.53 OF 2022

(Originating from probate and administration appeal no 02/2022 District Court Bariadi, the same originated from probate cause No.69 of 2021 Somanda Primary Court)

KWANDU NGWESO BULUGU.....APPELLANT

VERSUS

MAYENGA MAYALA NGWESO..... RESPONDENT

(Administrator of the estate of the late Ngweso Bulugu Masala)

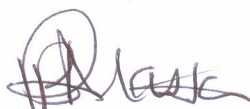
JUDGMENT

Last order on 1/11/2022

Judgment date on 10/11/2022

MASSAM, J.

This appeal under discussion is against the decision of the Bariadi District court at Bariadi. Brief of facts of this matter was that respondent at Somanda Primary Court prays to be appointed as administrator of the estate of Ngweso Bulugu Masala who died on 1/11/1981. The court



appointed him as prayed, but later on appellant objected respondent to be administrator of the said estate at the end of the trial the appellant lost his case after the court finds his objection to have no merit. The appellant did not see justice and appealed to District Court of Bariadi at Bariadi where the 1st appellate court upheld the decision of the trial court.

Still aggrieved he appealed now before this court with five grounds of appeal as follows;

(i) That the 1st appellate court erred in law and facts by not considering his second ground of appeal concerning the issue of notice.

(ii) That the trial court erred in law by not considering his third ground of appeal which saying that the trial court erred by appointing respondent to be administrator while there was no proper prayer in that.

(iii) That 1st appellate court reject his 4th ground of appeal that trial court did appoint respondent to be administrator without having jurisdiction to do so.

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(iv) That 1st appellate court erred in law and facts to use old forms while the same was no longer in existence and the new forms were existence with some modification.

(v) That the 1st appellate court was erred by not considering some other ground of appeal which are ground no 7 and 5, also she erred by introducing new issues which at the trial court were not discussed.

When the matter was called for hearing the appellant had the service of Mr. Paul Hobwana advocate, while the respondent enjoyed the service of Mr. Kitanda Mbogo advocate.

Submitting to his appeal on ground no 1 he said that the trial court erred in law and facts by not consider his 1st ground of appeal concerning the issue of notice. He added that the matter was filed at Somanda Primary Court without complied with Rule 5[2][3] of Primary Courts [Administration of Estate Rules GN 49 [1971] which coached with mandatory terms, it used the term **shall** to the effect that the notice shall be given to all persons other than applicants known or alleged to be near relatives of the deceased person.

Also, he said that Subrule 3 directs how that notice should be served and Subrule 3 referred to Rule 19 of CPPC which deals with summons, he added that the 1st appellate court at page 10 and 11 of the judgment said that she perused to the court record and found the said notice was attached to the court wall. He insisted that the trial court was supposed to give reasons why Sub Rule 2 was not complied with and use Subrule 4 which use the term may.

Again, he submitted that, in ground of appeal number 2 the court erred by not considering ground no 3 which the trial court appointed the respondent to be the administrator of the diseased estate while there was no proper prayer on that as the law directs that whoever wants to be administrator of the estate must be appointed through form no 1, in page number 11 of typed judgment the 1st appellate court said that when she perused the file on 26/11/2021 it's when she found the order of notice to be issued and pinned to the court notice board, but at the trial court judgment in page no 1 and 2 the court said that the form no 1 and 2 was filed on 29/11.2021 after payment of court fees, so the proceedings started before the payment of court fees, something which is not procedure.



Also, in ground of appeal number 3 he submitted that the 1st appellate court erred by rejecting his 4th ground of appeal concerning appointment of respondent without having jurisdiction the trial court appoint administrator pending the grant the power which the trial court does not have. And in the 1st appellate court did refer Regulation 2[a] and [h] of Magistrate Court Act Cap 11 where in that section gave general powers to the Primary courts but it did not give powers of appointing administrator pending the grant.

He added that the deceased died on 1/11/1981 and the probate case at Somanda Primary Court was filed on 26/11/2021 after the elapse of 40 days which is against the law of Limitation Act which direct the prescribed time to be within six years as elaborated in the case of **Yusuph Sami and Hawa Dadaa verse Khadija Yusuph** TLR 2002 347 at page 12, So according to that decision the present case was instituted out of time so everything happened in that case was nullity.

Again, he submitted to the ground no 4 that 1st appellate court used old forms which are no longer used after GN no 943 of 2020 which brought in existence new forms with modification.

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Lastly, he submitted that in firth ground of appeal the trial court erred by not considering some other ground of appeal which are ground no 5 and 7 and introduce new issues which at trial court was not discussed, that was improper and irregular procedure as elaborated in the case of **Amie Sadiq Sanga Vs Lucian Samson Sanga** P.C civil no 82 of 2021 H.C DSM Lataika J in page 5 and 6 said that it was wrong for 1st appellate court to fail to analyze and give reasons, so he said that the remedy available is to nullify proceedings.

He added to submit that in his ground no 7 he complained that the trial court gave the appointed administrator full power in administering the estate of the deceased while the applicant prayed the administration pending grant, the power which he abused it and continue to file another case civil case no 69/2021 at Somanga Primary Court.

Lastly, he prays that his appeal to be allowed, all judgments to be quashed and proceedings to be nullified and appointment of respondent to be cancelled.

Responding to the appellant submissions, starting with ground no 3 Mr. Kitanda learned Counsel for respondent conceded that the appellant prayed



for administration before grant but he corrected the same by saying that the same is called administration ad collaged bona defunct [administration for protection of estate pending delaying in making a general grant [full grant] so the decision which appointed respondent was right.

In response to the issue of time limitation which raised in ground appeal no 3 he said that the appellant relied on section 3[1] and 9 of Limitation Act which does not apply at the Primary court the law used is the Customary Law [Limitation of Proceedings Rules 1963 GN no 55 Of 1963, in addition to that he said that the raised issue is a new issue as at the 1st appellate court did not discussed, so he pray to this court to find ground no 3 with no merit.

In his reply to the ground no 4 he conceded that at the trial court uses the old forms but the appellants advocate did not inform the court the consequences of using the old ones, in the 1st appellate court judgment in page number 12 and 13 did discuss the same by saying that the new ones had some modification from the old one, so the use of old forms cannot be the reasons of nullifying the whole proceedings.



Also he said that the trial court was erred in appointing the respondent by using form no 2 instead of form no 1 and appellant complained that the respondent was appointed as a full administrator while he was temporary administrator, on his side he replied that 1st appellate court in his decision on page no 11-12 the court said that the use of form no 4 cannot overturn the order of the court, so its remedy is not to nullify the proceedings but to order the amendment.

Again in reply of the ground no 2 in the issue of the date of signing forms he admitted that form no 1 was signed on 29/11/2021 and form no 2 was signed on 26/11/2021 and that happened due to the payment procedure, because the control number was given on 29/11/2021 so the date in form no 2 which is citation remained the same, again the said contradiction cannot cause the whole proceedings to be nullified. Also the appellant informed this court that there was a new issue raised on the side of respondent which did not raised in the trial court he replied by saying that the appellant failed to mention what was the said new issue, so he pray the dismissal of this ground appeal as it has no merit.

In response to the ground of appeal no 1 where the appellant complained that the service of notice was supposed to be done hand by



hand as per GN no 49 of 1971 which is coached with mandatory term **"shall"** he replied that he don't agree with that as the counsel for appellant read Rule 5[2] [3] in isolation of Rule 5[4] which use the term **"may"** so it is his view that the notice was well served and fixed in the court notice board, so he pray the ground no 1 to be dismissed for want of merit.

Lastly, he prayed that if this court finds that the filled probate case was time barred, he concedes the nullification of both proceedings and quash of the both judgment, cancellation of appointment of respondent as administrator but not re trial order.

In his rejoinder the appellant's counsel submitted that the 2nd appellate court has a power to analyze all issues which arises in both courts, also the respondent in his submission he mention no law to support his submission but he tried to correct the language he used is in submitting ground appeal no 3 ,his concern is that the trial court had no jurisdiction to entertain this matter by appointing respondent as administrator and the issue of jurisdiction can be raised at any stage before delivery of the decision, Also in the issue of using old forms he insisted that coming of new forms render the use of old forms, as the aim of legislature was not to



use both forms concurrently, and the respondent admitted in his submission that the new forms had some modification and the form is the part of procedural law. Again, in the issue of issuing of the forms he still insists that form no 2 presided forms no 1 which issued on 29/11/2021.

In replying to the ground of appeal no 2 respondent admitted that the 1st appellate court use Sub Rule 4 of Rule 5 which is optional and left Sub Rule 2 and 3 which are mandatory. Lastly in the reliefs prayed by appellant, the respondent is conceding with that the remedy to the matter which is time barred is to nullify the proceedings and quash judgment of both courts.

I have considered the record of appeal, submissions for and against the appeal from both learned counsels, the pertinent issue for determination is **whether the appeal has merit.**

The duty of this court is to make sure that parties brought evidence which can prove his/ her case, in his side appellant submitted to this court that, the issuing of notice of the said application to the trial court was not complied with Rule 5[2] and 3 of the Primary Courts Administration of Estate Rules GN 49[1971]



In replying the same the counsel for respondent said that the appellants counsel read sub rule 2 and 3 with isolation of subrule 4 which gave the option by using the word **may** and not **shall**, so in this ground of appeal this court is in support of the appellants submission that the trial court decided the matter for noncompliance of rule 5[2] and 3 of the Primary Court [Administration of Estate GN no 49[1971], so this court finds merits in this ground of appeal and allow it.

Again appellant submitted that the grant which prayed by the respondent was temporary but the court issued him form no 4 which was full grant and respondent abuse it by filling the new case which he had power to file the same, In the side of respondent he conceded the same that respondent prayed to be given temporary administration in order to protect the estate of deceased pending delaying in making a general grant[administration ad collaged bona defunct]and he added that form no 4 given could not overturn the decision of the court. So, this court is in support of the appellants submission that the grant prayed was not the one issued, this makes the court to finds merits in this ground and allow it.

In the issue of using the old forms while the new forms are in existence the appellant submitted that the existence of new forms renders



the use of old ones. In his reply the respondent conceded that the forms used was old ones but he added that the respondent advocate did not inform the court the law which stopped him using the old forms, even though in his submission he agreed that the new forms had some modification. This court is supporting the submission from appellant that the existence of new forms renders the use of old ones, as it will have no meaning of introducing the new one which has modification from the old ones, as the aim of legislature was to modify the old ones and not using all concurrently, so the said ground appeal has merit and is hereby allowed.

In rejoining to his third ground of appeal the appellant submitted that the trial court entertained the case which filed out of time as the law give time limitation in institution of probate case to be six years but this case instituted after elapse of 40 years after the death of deceased, which is against the law of Limitation Act section 3[1] and under schedule 1 part 1 and item 24, to cement his submission he cited the case of **Yusuph Samiand Hawa Dadaa vs. Khadija Yusuph** TLR 2002 347 at page 12.

In his reply on that ground the respondent replied that Limitation Act does not operate in Primary Courts and he mention the law which used in Primary Courts to be Customary Law Limitation of Proceedings Rules 1963



GN no 55 of 1963 but he did not mention the section used in the issue of limitation, he added that the appellant's advocate raise this issue of jurisdiction as new issue as he was supposed to raise it in the 1st appellate court, this court finds out that the respondents failed to counter the issue of jurisdiction by giving this court the time limit in institution of Probate case as submitted by the respondent. Also he failed to tell this court in the mentioned law above which section deal with the issue of limitation.

This court finds out that the respondent did concede with the submission of appellant in ground no 3 of time limitation thus why in his reliefs he prayed to this court if finds that the matter was time barred to order nullification of the proceedings and quash judgment of both courts, cancellation of the appointment of respondent as administrator, and he pray this court not to order retrial. This court is in support of the submission from both sides that if this court find the matter to be time barred its remedy is to nullify the proceedings and quash judgment of both courts.

Based on what has been discussed above I find this ground of appeal no 3 with merit, I proceed to allow it, as the trial court had no jurisdiction to entertain the matter, which was time barred, therefore this court finds



no reasons to determine the other grounds of appeal which raised by the appellant as this ground disposes the whole appeal. I also nullify proceedings of trial and 1st appellate court and quash its judgment. No order of the cost according to the nature of the case.

It is so ordered.

DATED at **SHINYANGA** this 10th day of November, 2022.



R.B. Massam.
JUDGE
10/11/2022