

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

**CIVIL APPEAL NO. 299 OF 2020
(Appeal from the decision of the Resident Magistrates' Court of Dar es
Salaam, in Misc. Civil Application No. 24 of 2020)**

MOHSEN AHMED OMAR 1ST APPELLANT

OMAR AHMED OMAR 2ND APPELLANT

VERSUS

MOHAMED AHMED OMAR 1ST RESPONDENT

NARGIS AHMED OMAR..... 2ND RESPONDENT

JUDGMENT

27th September & 18th October, 2022

BWEGOGGE, J.

The appellants herein lodged an application in the Resident Magistrates' Court of Dar es Salaam under section 49(1) (e) of the Probate and Administration of Estates Act (Cap. 352 R.E 2002) and Rule 29(1) of the Probate Rules G.N. 369 of 1963 praying for orders of revocation/annulment of letters of administration granted to the two respondents, who are their siblings namely,

Mohamed Ahmed Omar and Nargis Ahmed Omar in Probate and Administration Cause No. 39 of 1998, among others. The trial court had struck out the application on the ground that it was time barred. The above named Appellants, being dissatisfied with the ruling of the trial court, appealed to this Court on the following grounds:

- 1. That, the Honourable Resident Magistrate erred in both law and fact by failing to apply the law governing the probate and administration of the estates, hence pronounced an unjust decision.*
- 2. That, the Honourable Resident Magistrate erred in both law and fact by striking out the Appellants' application on grounds of being time barred: hence, failed to decide the matter before him on merits.*
- 3. That, the Honourable Resident Magistrate erred in both law and fact by disregarding the appellants' prayer for the appointment of an independent investigator to investigate the issue of the alleged forged will which facilitated the fraudulent transfer of the house situated on Plot Number 35 Block 53 at Kariakoo and the house on Plot No. 60 Block M at Magomeni to the respondents' names whereas the respective properties are part and parcel of the deceased's estate.*
- 4. That, the Honourable Resident Magistrate erred in both law and fact by failing to analyze and consider the evidence adduced during the hearing in respect of the fraud and forgeries of the will presented before him, thereby failing to decide on the same.*

The facts of this case, as gathered from the pleadings filed at the trial court and submission made by counsel for both parties, are as follows: The appellants herein are amongst the heirs of their deceased mother namely, Rukia Ahmed Omari, @Rhukia Ahmed Omari @ Lukia Sheikh Ali who died testate in 1998. Prior to her death, the deceased had written a will on 29th July, 1997 naming the respondents herein as co-administrators of her estate for the interests of the beneficiaries. It was the complaint of the appellants herein at the trial court that after being granted letters of administration, the respondents have willfully and without reasonable cause omitted to exhibit an inventory or account of properties left by their deceased mother.

It was alleged by the appellants herein that the two respondents have fraudulently and unlawfully transferred ownership of two properties which are the house situated on plot No. 35 Block 53 located at Kariakoo within Ilala District, in Dar es Salaam Region and another property located at Magomeni area within Kinondoni District, in Dar es Salaam Region on Plot No. 60 Block M. Allegedly, the property at Kariakoo was transferred to Nargis Ahmed Omar who is the 2nd Respondent whereas the property at Magomeni area was transferred to the 1st respondent one Mohamed Ahmed Omar. The alleged forgery was, in fact, an alteration of a will left by the deceased and the said transfer was done without the consent or knowledge of the other six

beneficiaries namely, Khadija Ahmed Omar, Fatma Ahmed Omar, Ahmed Ahmed Omar and Hamid Ahmed Omar. Further, it was deponed that the deceased will stipulates that all the heirs would benefit from the estates of all the properties mentioned in the will as well as other properties not mentioned in equal shares. The mentioned properties were Plot No. 3Q located at Ngoto Street Morogoro, Plot N. 1B1 Kichangani Morogoro, Plot No. 3C1 Kichangani Morogoro, and Plot No. 560 Kawe Area Kinondoni District Dar es Salaam.

The will had also instructed that deceased gold ornaments be shared equally amongst her daughters. The real properties not included in the will are namely, Plot No. 60 Block M located in Magomeni area Kinondoni District, and Plot No. 35 Block 53 situated at Ilala Kariakoo District, all in Dar es Salaam Region. The other properties were Toyota Hilux Pick up with Registration No. T143 AFU and money kept in the deceased strong room.

It was vehemently alleged at the trial court that after the death of the testator, the respondents secretly applied to be granted letters of administration vide Probate and Administration Cause No. 39 of 1998 which the trial court granted them on the 28th day of October, 1998. That previously, On 27th July, 1998, Nargis Ahmed Omar, the 2nd respondent, filed a chamber summons seeking amendment of the name of the deceased/ testator and inclusion of other properties which initially were not included in the will i.e.

house on Plot No. 35 Block 53 Kariakoo and a house on Plot No. 60 Block M Magomeni area. Thereafter, it was alleged, the respondents transferred ownership of the said properties to their names.

In tandem with the above, it was alleged that in order to facilitate the said transfer the respondents herein had presented a forged will to the Registrar of Titles purporting that the testator had bestowed the two properties to their possession in exclusion of the other six beneficiaries. It was deponed by the applicants herein that one Rehema A. Ahmed, one of the witnesses to the said will, has confirmed her signature on the valid will only but denied her purported signature on the allegedly forged will.

The trial magistrate, having considered the deponed facts and submissions by both parties herein was of the considered opinion that the available depositions by both parties, in particular from the applicants, were in such a way that they couldn't resolve the issues of forgeries and fraudulent acts alleged by the applicant. Further, the trial magistrate found that the letters of an administration of the deceased estate were granted way back in 1998 and civil matters have a limitation period to be dealt with by the Courts of law as they are governed by the Law of Limitation Act (Cap. 89 R.E. 2019). Therefore, the trial magistrate opined, a lapse of about 22 years is such a long period which even the Law of Limitation Act doesn't provide room for

the applicant to challenge anything. The trial court had found that the application was time barred and struck out the application in its entirety.

The appellants being confident that they were denied the right to be heard, had appealed to this court and prayed this court to reverse and, or quash the ruling entered by the trial court, among others.

The applicants were represented by Mr. Silvanus Mayenga and Anna Marealle, the learned advocates, whereas the respondents enjoyed the services of Mr. Stephen Mosha, the learned advocate. The submissions of the counsel herein in respect of the 1st and 2nd grounds of appeal, which this court finds crucial in the determination of this appeal, are recounted hereunder.

The counsel for the applicant, in substantiating the 1st ground of appeal, contended that the trial Magistrate had failed to apply the applicable law and, or principle governing probate administration matters as there was a failure on part of the respondents to administer the estate, including the acts amounting to forgery. That the applicable law was not invoked by the trial Magistrate as there was the failure by the respondents to submit an inventory of probate. The Counsel alleged that for 20 years, the respondents have failed to administer the estate by failing to submit a statement of accounts/inventory and the respondents themselves didn't dispute the

allegation in their counter Affidavit. That the applicable law in this matter is S.107 of the Probate and Administration of Estates Act which provides for six (6) months as a period of submission of inventory which was not invoked by the trial court.

In validating the 2nd ground of appeal, the counsel for the applicants has charged that there was an error of the law on part of the trial Magistrate for striking out the application on the ground of time limitation as the issue as to whether the matter was time barred was not raised during the trial but featured at the time of delivering the ruling. Thus, the court had *suo motu* raised the issue of time limitation and proceeded to decide on it without inviting the parties to submit thereon. Hence, the counsel opined, it denied parties the right to be heard. The counsel referred this court to the case of ***Wegesa Joseph Nyamuse vs Chacha Muligo*** Civil Appeal No. 161 of 2016 CA (unreported) to buttress the point on the importance of the right to be heard.

The counsel concluded his submission by opining that the lower court had failed to properly decide on the matter before it and made an erroneous decision. He prayed this court to quash and set aside the decision and order entered by the trial court and allow this appeal.

Mr. Masha, counsel for the respondents countered that the trial Court was right to have refrained to employ the provision of the Probate and Administration of Estates Act as it doesn't provide for time limitation, and properly invoked the Law of Limitation Act.

And in responding to the 2nd ground of appeal the counsel submitted that the trial Magistrate rightly held that the matter was time barred. That the time limitation is not well provided in the Act cited by the Counsel for the applicant; hence, in such circumstances, the law applicable is the Law of Limitation Act.

Therefore, the counsel opined, the trial Magistrate well guided himself to the law taking into consideration the fact that the probate is dated back to 1998.

Further, the counsel contended that the appellant could have filed an application for revocation of the letters granted to the respondents after the expiration of the statutory period of six (6) months, or otherwise, they could have filed an application for an extension of time in which to apply for leave to file the application for revocation. Hence, the appeal herein is misconceived. The counsel opined that the right course to be taken by this court is to instruct the appellants to return to the trial court for necessary action. The counsel concluded that the issue of time limitation needed no further submission from the parties herein as it was a jurisdiction issue.

The issue for the determination by this court is whether the trial court was justified to strike out the application lodged on the ground that it was time barred.

From the outset, this court finds it pertinent to restate the obligation imposed by law upon an executor or administrator/administratrix of the deceased estate. The provisions of Section 107(1) of the Probate and Administration of Estate Act provides as under:

"S. 107

1. ***An executor or administrator shall, within six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate or letters may from time to time appoint or require, exhibit in that court an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character, and shall in like manner, within one year from the grant or within such further time as the court may from time to time appoint, exhibit an account of the estate, showing the assets which have come to his hands and in the manner in which they have been applied or disposed of.***
(Emphasis mine).

It is apparent on the face of the afore-reproduced provision that the appointed executor or administrator/administratrix of the deceased estate is vested with a mandatory legal duty to exhibit in the court that granted the letters of administration of the estate an inventory containing a full and true estimate of all the property in possession, and all the credits, and also all the debts owing by any person to which the executor or administrator is entitled in that character. The appointed administrator/administratrix of the deceased estate is required to discharge the duty mentioned above within a prescribed period of six months from the grant of probate or letters of administration, or within such further time as the court which granted the probate may provide. Further, the law cited above, in no uncertain terms commands that the executor or administrator/administratrix of the deceased estate is likewise obliged to exhibit an account of the estate, showing the assets which have come to his hands and in the manner in which they have been applied or disposed of, within one year from the grant or within such further time as the court may from time to time appoint.

The legal duty of the executor or administrator/administratrix of the deceased estate is further clarified in the case of **Joseph Shumbusho vs Mary Grace Tigwera and 2 Others**, Civil Appeal No. 183 of 2016 CA (unreported) whereas the superior court had observed:

"In the performance of his duty as a legal representative, the law requires him to act in accordance with his oath. And what does this mean? Section 66 of the Probate and administration act require the grantee of the probate or letters of administration to take an oath that he/she will faithfully administer the estate of the deceased and will account for the same. That is the administrator will faithfully administer the deceased's estates by first paying just debts of the deceased, distributing the residue according to the law, making and exhibiting a full and true inventory of the deceased's properties and credits and rendering a true account of the administration. The rationale of exhibiting the inventory and accounts is to keep the beneficiaries informed and to have transparency in the execution/administration of the deceased's estates... "

In the same vein, the law enjoins the court with the power to revoke the granted letters of administration of the estates of the deceased person to the administrator/administratrix of the deceased estate based on prescribed grounds stated under the provisions of section 49 (1) of the Probate and Administration of Estates Act. The stated reasons under the relevant section are as under:

"S. 49

- 1. The grant of probate and letters of administration may be revoked or annulled for any of the following reasons-*

(a) N/A

(b) N/A

(c) N/A

(d) that the grant has become useless and inoperative; (e) that the person to whom the grant was made has willfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Part XI or has exhibited under that Part an inventory or account which is untrue in a material respect."

Having explored the law above, this court reverts to the gist of the appellant's case at the trial court. It was alleged in the affidavit of the applicants and written submissions filed thereto that the respondents herein have willfully and without reasonable cause omitted to exhibit an inventory or account of properties for more than 20 years, contrary to the law, let alone the allegations of fraudulent and unlawful transfer of ownership of the properties from the deceased estates.

Based on the allegations mentioned above, the appellant had prayed for the revocation of the letters of administration of the deceased estate granted to the respondents for being useless and, or inoperative. On the face of it, these are serious allegations that required the attention of the trial court. It is obvious that the trial court had failed to attend the issue before it and invoked

time limitation, without citing relevant provisions, to justify the dismissal of the same. To hold that the appellants are timely barred to invite the court to inquire into the alleged failure of the respondents to account for the deceased estate they were vested to administer is tantamount to blessing the alleged breach of the legal duty imposed on their shoulders to the detriment of the beneficiaries of the estate. This defeats the object of the provisions of the law forecited.

And, it is apparent on the face of the record that the trial court had raised the jurisdiction issue *suo motu* and proceeded to resolve the same without affording the parties the right to be heard on the respective issue. It is the law of this land that it is inappropriate for the court to raise jurisdictional issues *suo motu* and determine them without hearing the parties. See the cases namely, **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo**, Civil Appeal No. 161 of 2016, CA (unreported) and **Margwe Erro, Benjamine Margwe vs. Moshi Bahalulu**, Civil Appeal No. 11 of 2014 CA (unreported). In the case of **Margwe Erro, Benjamine Margwe vs. Moshi Bahalulu** (supra) the superior Court had this to say:

"The parties were denied the right to be heard on the question the learned judge had raised and we are satisfied that in the circumstances

of this case the denial of the right to be heard on the question of time bar vitiated the whole judgment and decree of the high court.

Without much ado, we find there to be merit in this appeal which we accordingly allow. We find the judgment of the High Court to have been a nullity for violation of the right to be heard."

Further, in **Wegesa Joseph M. Nyamaisa vs. Chacha Muhogo** (supra) the Court opined:

"In the instant appeal we are minded to re-assert the centrality of the right to be heard guaranteed to the parties where courts, while composing their decision, discover new issues with jurisdictional implications. The way the first appellate court raised two jurisdictional matters suo motu and determined them without affording the parties an opportunity to be heard, has made the entire proceedings and the judgment of thecourt a nullity, and we hereby declare so."

Based on the above observation, it is obvious that the trial court's decision to dismiss the matter on the ground of time limitation without affording the parties the constitutional right to be heard amounts to nullity. This court subscribes to the assertion made by the counsel for the appellant that the trial court had denied the parties their right to be heard before the impugned decision was entered. The 1st and 2nd grounds of appeal are merited. Hence, the issue raised above is hereby answered in the negative.

Having answered the issue raised herein above in the negative, I find it needless to attend the remaining grounds of appeal. However, in passing, I am obliged to mention that one of the prayers made by the appellants before the trial court, which in fact is the crux of the 3rd and 4th grounds of appeal herein, was for the court to appoint a private investigator to inquire into the alleged fraudulent acts of the respondents and take action. With respect, this prayer was misplaced. The lower court should not tread on this road. It is prudent that the proposed investigation of the alleged forgery and fraudulent acts levelled against the respondents be conducted by law enforcement agents, specifically the investigation bureau.

Likewise, the counsel for the respondents has also asked this court to make an order for the respondents to discharge their legal duty imposed on them on the prescribed period. With respect, this prayer is also misplaced. It should have been made before the trial court.

All said, this court finds the appeal herein meritorious. The appeal is hereby allowed. The decision of the trial court and dismissal order entered thereto are hereby quashed and set aside. The original case, *i.e.*, Misc. Civil

Application No. 24 of 2020, to be remitted to the Resident Magistrate Court of Dar es Salaam at Kisutu, to be heard on merit.

Order accordingly.

DATED at DAR ES SALAAM this 18th of October, 2022.



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O. F. BWEGOG
JUDGE

The judgment has been delivered this 18th October, 2022 in the presence of the 1st appellant and Mr. Stephen Masha, Counsel for the respondents.

Right of appeal explained.



A handwritten signature in blue ink, appearing to read "Bwego".

O. F. BWEGOG
JUDGE