

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

PC. CIVIL APPEAL NO.18 OF 2022

*(Originating from Civil Appeal No. 15 of 2021 Arusha District Court & Probate No.
138/1998 Arusha Urban Court)*

ISMAIL KHALIL..... APPELLANT

VERSUS

SAKINA ABDI, the Administratrix of the estate of the late Abdi

Hassani.....**RESPONDENT**

JUDGMENT

15/02/2023 & 28/03/2023

GWAE, J

The area of controversy between the appellant, Ismail Khalil and respondent, Sakina Abdi, the administratrix of the estate of her late father, revolves from Probate and Administration Matter. It is the version of the appellant that, the suit property, a house on Plot No. 22 Block "1" Area "F" Pangani-Arusha Municipality is the estate of his later father, **Khalil Mohamed**. On the other hand, the respondent's version is to the effect that, the suit property is the estate of his late father **Abdi Hassani** as well as the said late **Khalil Mohamed**.

The briefs facts of the case that led to these proceedings from 1991 up to date as are as herein under. The appellant's brother known by the name of Mahmud Khalil is said to have petitioned for the letters of Administration of his late father, Khalil Mohamed who died on 12 April 1984 through Probate and Administration Cause No. 40 of 1991 in the Arusha Urban Primary Court. On the 11th day May 1992, the said Mahmud Khalil allegedly granted the letters of administration of the estate of his late father, Khalil Mohamed.

The records further reveal, through certificate of title relating to the suit property that, one **Alli Mohamed** was the registered owner of the suit property. However, on 27th day of March 2000, both the appellant and Mahmud Khalil purported to have solemnly affirmed to the effect that, the name, "Alli" Mohamed was the nick name of their late father, Khalil Mohamed, Hence, name **Alli** is the same as **Khalil**. There is also a paper purporting to be an inventory bearing no date of its closure (I have purposely used the word "purporting" or "is said" or "alleged" since the documents received by the trial court on 2nd November 2020 were only received for identification purposes.

Seemingly, from the records of the subordinate courts, the respondent was appointed by Arusha Urban Primary Court (trial court) to

be an administratrix of the estate of his late father, Abdi Hassani on 7th December 1998. In the course of administering the deceased's estate, respondent faced challenges from the heirs of her uncle, Khalil Mohamed (Baba mdogo, mzaliwa na baba yake marehemu) alleged to have been using the suit property in their own benefits. On 25th March 1999 the trial court ordered equal distribution of six rooms to the heirs of the late Abdi Hassani and those of the late Khalil Mohamed. Both are the grandsons of one **Mwahija Abdallah**.

The late Mwahija Abdallah during her lifetime happened to marry two different men at different times to wit; Mohamed Jabiri and Hassani Bilal. Therefore, the appellant and respondent are grandson and daughter of the late Mohamed Jabiri (1st husband to the late Mwahija) and Hassani Bilal (2nd husband of Mwahija) respectively.

Subsequent to the order dated 25th March 1999, the respondent filed an application for execution of the order in the same case file that is Administration Cause No. 38 of 1998 and on 31st October 2007 the trial court reinforced its former order made on 25th March 1998 in the presence of the said Mahmud/Mahmoud Khalil. On 28th April 2007 an execution ordered by the trial court was stayed by the District Court pending hearing and determination of the matter before it (An application for revision filed

by one **Mahmoud Khalil Mohamed**, now deceased via Civil Application No. 10 of 2006). The said application suffered from legal technicalities notably, wrong citation, limitation of time, incurable affidavit and new or wrong party to the subsequent revision proceeding. Consequently, it was struck out on 16th February 2009.

Determinedly, the appellant subsequently filed a land dispute in the District Land and Housing Tribunal via Application No. 129 of 2009 which was however, struck out on 13th July 2010, the parts of the holding of the District Court was as herein under'

"(Primary Court) to register two various Probate Cause No. 40 of 1991 and 138 of 1998 and appoint for each administrator to deal with the same property....This tribunal cannot proceed to deal with anything except referring the court with proper jurisdiction to deal with the matter properly but current position must remain as its because there is no doubt that the applicant has his share n the Probate Cause No. 40 of 1991 as exhibited by the tendered document. Unless otherwise legally ruled by other competent courts. Thus, the whole matter is withdrawn to that extent."

On 2nd day of June 2020, the appellant wrote a letter to the trial court asking for elimination or deletion of the suit house being among the estate of the late Abdi Hassani (the respondent's late father). However,

the trial court through its decision dated 22nd February 2021 maintained that, the order dated 25th day of March 1999 was still valid, therefore, it is enforceable since it has never been vacated.

Aggrieved by the trial court decision delivered on 22nd February 2021 to the District Court via Administration Cause No. 138 of 1999. The District Court (1st appellate court) upheld the decision of the trial court made on 25th March 1999 adding that it was wrong for the trial court (**Hon, Kashero-RM**) to entertain the appellant's matter as it was functus officio.

In his second bite to this court by way of appeal against the decision of the 1st appellate court as well as that of the trial court. His grounds of appeal are nine however, the same are summarized forming five grounds of appeal as follows;

1. That, the primary court erred in law by acting ultra vires since it assumed powers of administration of the deceased's estate
2. That, the 1st appellate court erred in law by failing to exercise its revisional powers vested on it by reversing, quashing and setting aside the trial court's proceedings and judgment since the 1st appellate court observed serious errors on point of law

3. That, the primary court erred in law by entertaining new probate cause on the same property while the same court heard Probate Cause No. 40 of 1991 which was already closed as administrator of the estate filed Form No. 4 and 6
4. That, the primary court erred in law and fact in declaring that the suit property bearing the name of the appellant and that of the late Mahmud Khalil be sold while it is not the property of the late Abdi Mohamed
5. That, the trial court failed to properly analyzed evidence before it

At the hearing of the appeal Mr. Salehe Salehe and Mr. Hamidu Mushi, both the learned advocates appearing representing the appellant and respondent respectively.

Arguing the 1st ground, Mr. Salehe that the trial court misdirected itself by ordering the sale of suit property and equal distribution of its sale proceeds, thus, usurping the duties of an administrator of collecting and to distributing the deceased's estate. He referred this court to the case of **Nuru Salum vs. Hisina**, Probate and Administration Appeal No. 10 of 2019 (Unreported-HC Mwanza).

In the 2nd ground, the learned counsel for the appellant submitted that, upon observation of the irregularities by the 1st appellant Secondly, the same error ought to have been rectified by the 1st appellate court exercising its revision powers.

Mr. Salehe also argued the 3rd ground by stating that it was wrong for the respondent to institute the Probate and Administration No. 38 of 1998 since the estate involved in Probate Cause No. 40 of 1991 is the same and since the former probate was formally closed on 24th December 1997 by the late Mahmud Khalil. He added that, if the respondent had a genuine claim against the appellant she ought to have filed a land dispute suing the appellant. He then urged the court to adhere to the binding judicial authority of the Court of Appeal of Tanzania in the case of **Ahmed Mohamed vs. Fatuma Bakari and another**, Civil Appeal No. 71 of 2012 (unreported).

In the 4th ground, the learned advocate for the appellant argued that the trial court ought not to have considered the respondent's act of including the suit property since at the time of her institution of the cause the Former Cause was closed. He finally prayed for an order allowing this appeal and quashing the proceedings and decisions of the courts below.

On other hand, Mr. Mushi strongly opposed this appeal by counter attacking the grounds of appeal as presented and argued. Responding to the 1st ground, he stated that it is was proper for the trial court to give direction relating to the suit property since the respondent applied for the distribution of rooms or alternatively the suit house at pangani to be sold and its sale proceeds be equally distributed. He referred this court to GN. 49 of 1971, the primary court Administration of Estate Rules, Rule 8 (b) (f) which according to him, it provides that, the court may decide any question arising or relating to sale, petition or disposal of the properties. He distinguished the decision in the case of **Nuru's case** (supra) cited by the appellant's counsel. He also invited the court to refer to **Tumaini Thomas Mfyuji vs. Christopher**, Probate and Adm. Appeal No. 2 of 2019 (unreported) where the sale of suit property was found to be the best option. He added that this matter is time barred on the ground that, the appellant was aware of the matter since 31st October 2007 as per his testimony before the trial court that, he was aware of the matter filed by the respondent, Sakina Abdi.

Mr. Mushi went on stating that the respondent's revision through Application No. 10 of 2006 before the 1st appellate court was time barred as per section 22 (4) of the Magistrate Courts Act, Cap 11 Revised Edition,

2002 and that the remedy for the order issued on 22nd February 2021 was to file a case afresh.

As to the appellant's complaint that, there was a former probate and administration cause No. 40 of 1991 instituted by the appellant's elder brother, the respondent's counsel argued that, the appellant's complaint is fallacy since the same is not featured in courts' proceedings including on 31. 10. 2007 when the appellant's brother appeared before the trial court. He did not state if he was playing a role of an administrator of the estate of his late father, Khalil Mohamed.

In the complaint of alleged failure to analyse evidence by the trial court, Mr. Mushi argued that, this court has no jurisdiction to determine issue of analysis of evidence since the same was not determined by the 1st appellate Court. Buttressing his submission, he cited the case of **Justine Bruno vs. DPP**, Criminal Appeal NO. 313 OF 2018 (unreported) where the Court of Appeal held that, an appellate court could not have jurisdiction to entertain new ground if not raised as well as in **Raphael Mganzi vs. Abdallah Kalonjo Juma**, Civil Appeal No. 240 of 2018 (unreported) where the Court of Appeal held that the matter not raised on trial and even at the 1st appellate court, the 2nd appellate court cannot have power to entertain.

As to the 4th ground on the alleged conflicting decisions dated 13th July 1999 and that dated 25th March 1999. The respondent's counsel of the view that, this ground is improperly raised since there had been no a Civil Case No. 204 of 1998 before the trial court. He concluded by urging asking this court to dismiss the appeal with costs notwithstanding the parties' relationship on the ground that, the appellant is still benefiting from the estate in question with exclusion of the respondent and her siblings.

In his brief rejoinder, Mr. Salehe enumerated that, the respondent's did not bring a proposal of sale of the estate in question save that she sought an advice. He added that, the trial court wrongly stepped into the shoes of an administratrix. He went on stating that the decision dated 25th day of March 1999 breached the fundamental principles regarding right to be heard since the appellant was not heard as he was not served. He also stated that, the case of **Tumaini's case** (supra) is distinguishable since the former is all about heirs who are not satisfied with the estate's distribution while the former is on the ownership.

Rejoining to ground on alleged failure to analyze evidence by the trial court, Mr. Salehe stated that the same was among the appellant's

grounds of appeal as depicted in the appellant's petition of appeal in ground 3 and 4 of the Petition of Appeal.

Having briefly summarized the historical background of the matter between the parties, subordinate courts' decisions as well as the parties' arguments before the court on appeal, I am now duty bound to determine the appellant's grounds of Appeal herein. However, as the matter of limitation of time and *factus officio* or both touch authority of the court and since not only the parties argued it but also courts bellows discussed the same. Indeed, issue of limitation of time and *functus officio* were the basis of decision of the 1st appellate court dated 28th September 2021 and primary court dated 22nd February 2021 respectively.

Taking into account that the order of sale of the suit property by the trial court was made on 25th March 1999 but till 31st July 2007, it was yet to be conducted following the letter from the District Court dated 28th April 2007. The said letter directed stay of execution pending hearing and determination of Miscellaneous Application No. 6 of 2006 filed by the appellant's late elder brother, Mahmud Khalil. I think, the appellant, if proved to be co- owner of the suit land or an administrator of the estate of the late Khalil Mohamed ought to have filed an objection proceedings

claiming that, the suit property is not the estate of the late Abdi Hassani but, it is his and his late brother.

The objection proceedings ought to have been filed pursuant to Rule 70 (1) of the Magistrates Court (Civil Procedure in Primary Courts) Rules GN. No 310 of 1964 and the same was to be filed within sixty **(60)** days in terms of item 21 to the schedule of the Law of Limitation, Cap 89, Revised Edition, 2019. The time ought to have accrued from the date of being aware of the respondent intention to sale the suit property or the respondent's inclusion of the suit property in the administration of the estate of the late Khalil Mohamed.

As appearing in the application for execution when the late Mahmud Khalil appeared before the trial court (**Hon. Kassim-PCM**) on 31st October 2007 to show cause as to why execution should be carried out as per the trial court order dated 25th March 1999. In my view, the appellant and his elder brother were aware of the execution order made by the trial court on 25th March 1999 that is why the late Mahmud filed an application for revision in the 1st appellate court, Application No. 6 of 2006.

I am however not agreement with the learned Resident Magistrate sitting at the 1st appellate court who held that, the trial court (**Hon. Kashero-RMS**) was functus officio. I am of that view for an obvious

reason that, the trial court proceedings do not depict if the late Mahmud when appeared before him on 31st October 2007, did so in the capacity of an objector in regard too the execution by the respondent. I am strongly of the view that, he was the one who appeared to show cause as why the execution should not proceed.

More so, the District Court (**Hon. Mkwizu, RM** as she then was now, **J** of the court) did strike out the application for revision for inter alia that, the application is time barred thus contravening section 22 (4) of Magistrates Court's Act (supra). Though for the purpose of clear record I am not in agreement with my learned sister that a stranger to the proceedings cannot apply for revision. It is so, in filing of an appeal as opposed to the filing of an application for revision (See decisions in **Mgeni Seif vs. Mohamed Yahaya Khalifani**, Civil Application No. 104 of 2008 and **Attorney General vs. Tanzania Ports Authority and two others**, Civil Application No. 87 of 2016 (unreported-CAT)).

That, being the position that, the revision application was struck out on among other reasons including limitation of time, the questions that follows is that, was that proper for the late Mahmud Khalil to institute Land Application before DLHT?. According to the Order XX1 Rule 62 (i) of CPC and case, law once one loses his objection proceeding his remedy is

to file a fresh suit to the court of competent jurisdiction. This position was correctly underscored by this court in the case of **Thomas Joseph Kimaro vs. Apaisaria Martin Carl Mkumbo and Oscar Carl Mushi** (2002) TLR 369 where it was stated;

"Where a claim or objection is preferred, the party against whom an order is made may institute a suit to establish the right which he, claims to the property in dispute but, subject to the result of such suit, if any, the order shall be conclusive. Because the objection proceedings under Order 21, rule 57 are not appealable, the present appeal is incompetent. The appellant can, as stipulated under Order 21, rule 62, sue for title of the property he is contesting. In view of the above, the appeal is struck out with."

The Court of Appeal in **Sosthenes Bruno and another vs. Flora Shauri, Civil Appeal No. 249 of 2020** (unreported) approved the same position held in the cited above, it held;

"However, a party aggrieved by the decision under rule 63 of Order XXI, may lodge a suit in the court of competent jurisdiction."

The above precedent are related to cases where Civil Procedure Code, Cap 33, Revised Edition, 2019 (Code) is applicable unlike to the matter at hand where the Code is not legally applicable. Nevertheless,

since the objection proceedings for matters before primary courts ought to have been filed pursuant to Rule 70 (1) of the Magistrates Court (Civil Procedure in Primary Courts) Rules GN. No 310 of 1964. Borrowing the provisions of Code and case law cited above, though the Rules do not provide such avenue but in my view, the remedy available for a party in an objection proceeding to whom an order has been made against him is to file a fresh suit to the court of competent jurisdiction.

Guided by the above position, I am of the considered view that, it was not proper for the appellant or his late elder brother, Mahmud Khalil or an administrator of the estate of the late Mahmud to institute the suit in court of competent jurisdiction likely in ordinary courts. I am of that view since the dispute arose before the operation of Land Courts (1991-1999) whereas the operation of Land Courts in our country commenced by October, 2003. I hold that view simply because, in 1999 the respondent immediately after the grant of her letters of administration turned back to the court complaining that, she failed to distribute the suit property since the family of the late Khalil Mohamed is only benefiting out of it in exclusion of the family of Hassani Bilal. Similarly, considering the act of the late Mahmud of instituting the revision application in 2006 in the 1st appellate court. Hence, it follows that, the appellant and his late brother

were aware of the grant of letter of administration to the respondent in 1999.

Subsequent to the order of the 1st appellate court dated 16th day of February 2009, the appellant filed a fresh suit in the District Land and Housing Tribunal via Application No. 129 of 2009 alone as the sole owner of the suit property. In my view, this is another anomaly. How is it possible is it, if truly, the suit property was distributed to the late Mahmud and the appellant? The answer is to the negative since the late Mahmud Khalil must have heirs who would be interested in the suit property. If this kind of institution is permissible by our courts it will be like creating other future glitches within our society, the parties' family. Therefore, yielding of unnecessary litigations due to courts' resolutions of litigants' disputes in a piece meals. It is perhaps pertinent to abide to the instructive decision of the Court of Appeal of Tanzania in the case of **Farida Mbaraka and Farid Ahmed Mbaraka vs. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported) where it held among other things that;

"Under this rule, a person may be added to a suit (i) when he ought to have been joined as plaintiff or defendant and if not joined so or (ii) when, without his presence the question in the suit cannot be completely decided."

Nevertheless, the DLHT vividly delivered its decision withdrawing the matter instead of striking it out on 13th day of July 2010 based not on the preliminary objection canvassed by the respondent and court broker rather on the jurisdictional issue. From 13th July 2010 when the DLHT rendered its decision the appellant or his late brother or both did not either appeal against the DLHT's decision.

If the appellant was aggrieved by the decision of DLHT withdrawing his case he would timely appeal to the court as was correctly stressed in **Meloldi Domel vs. Samson Kuray and two others**, Land Appeal and others. 14 of 022 (unreported) this court at Manyara) if really they became after land courts were in operation. Alternatively, they could apply for revision to the court. However, as revealed by the records it was until 2nd June 2020 when the appellant wrote a letter indicative of objection proceedings. The objection proceeding was filed in the same file and eventually it was dismissed on the ground that the trial court was functus officio.

Assuming that, the time of the accrual of action that is, since 25th March 1999 to 2009 was statutorily excluded by pendency of the cases in our courts. Nonetheless, since 13th July 2010 when DLHT strike out the appellant's case to 2nd June 2020 when he filed the objection proceedings

or if the court were to rely on his assertions that he was not aware of the Probate and Administration Cause No. 38 of 1998 prior to 2006. The objection filed on 2nd June 2020 is extremely time barred as the decree of lateness is almost ten years without condonation. It is trite law that parties cannot be allowed to come to the courts at the time of their wishes but in accordance with the prescribed period.

Immediately after the DLHT's order, the respondent applied for execution that, is on 24th March 2021 nevertheless the appellant filed the appeal in the 1st appellate court and this 2nd appeal as elucidated earlier but the objection proceedings before the trial court was extremely time barred as was the case before Mkwizu-RM now J.

Although, the above court's determination suffices to dispose of the appellant's appeal but I find it noteworthy to determine ground 3 and 4 on the alleged subsequent institution of Probate and Administration Cause No. 38 of 1998 while the former granted to the late Mahmud Khalil via Probate No. 40 of 1991 was closed. At the outset I would hold that this issue is not new issue As the same was raised before the trial court on 2nd November 2020 by the appellant. It is general principle that once an administration cause or probate cause is closed by exhibiting inventory and final accounts, a remedy available for an aggrieved by party is to file

a civil or criminal case instead of instituting another Probate and Administration Cause. In **Ahmed Mohamed Al Lamaar**, Civil Appeal No. 71 of 2012 (unreported) where the Court of Appeal of Tanzania had the following 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 in terms of section 49 (1) of the Act. As the appellant was already functus officio....."

In our instant matter, the appellant and respondent had their late fathers, of the same late mother (Mwahija) who might have distinct estate for distribution to their respective heirs. As gathered from the record the respondent instituted among other properties listed as estate of the late Abdi were; a house located at Lovolosi area, one farm situated at Ngaramtoni and the suit house. Thus, it is evidently clear that, it was not only the suit house that, led to the respondent's act of instituting petition for grant of letters of administration but other estate of her late father, Abdi Bilal.

More so, if the family members of the late Mwahija Abdallah were previously in harmony and or they mutually and customarily agreed that,

the suit house is the property of the family of Mwahija (Mwahija's sons, late Khalil Mohamed and the late Abdi Bilal and their ascendants) but afterward one family designed idea contrary as opposed to the former agreement. In these circumstances, the best option for the respondent was to institute the Administration Cause so that she could have legs to stand to collect the estate, sue or be sued for her own interests or obligations and the interests of other heirs of the late Abdi because it was his father who had shares on that suit property. Therefore, in my view, the circumstances of this case where the respondent and her relatives are denied their shares like rents are quite distinguishable from the cited case cited above and in **Ahmed Mohamed vs. Fatuma Bakari and another**, Civil Appeal No. 71 of 2012 (unreported) cited by the appellant's counsel.

Having deliberated as herein above, I find this appeal is without merit. It is therefore dismissed. Given the appellant's acts towards the proceedings aforementioned, the appellant shall bear the costs of this appeal.

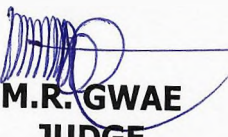
It is so ordered.

DATED at Arusha this 28th day of March, 2023.


M.R. GWAE
JUDGE
28/03/2023

Court: Right of appeal fully explained




M.R. GWAE
JUDGE
28/03/2023