

IN THE HIGH COURT OF TANZANIA

TEMEKE SUB-REGISTRY

(ONE STOP JUDICIAL CENTRE)

AT TEMEKE

CIVIL APPEAL NO. 41 OF 2022

(Arising from Miscellaneous Civil Application No. 125 of 2021 at Temeke District Court)

SELINA STEVEN MALLYAAPPELLANT

VERSUS

ADMINISTRATOR GENERAL1st RESPONDENT

MWAMVITA RAJAB MUHOZA.....2nd RESPONDENT

JUDGMENT

Date of last order: - 10/02/2023

Date of judgment: - 07/03/2023

OMARI, J.

At the centre of this dispute is the estate of the late Steven Pius Mallya. Selina Steven Mallya, the deceased's widow (and Appellant herein) and one Aman Steven (the Appellant's son with the deceased) were appointed to jointly administer the said estate in Administration Cause No.33 of 2016. After the lapse of six months without making any progress on the administration of the said estate the 2nd Respondent herein successfully applied for revocation of the administrators' appointment in Misc. Civil

Application No. 326 of 2016. Consequently, the 1st Respondent herein was appointed in their place. The Appellant unsuccessfully challenged the revocation. She later filed Civil Application No. 125 of 2021 in District Court of Temeke through which she was seeking several orders; but, in the context of this Appeal I shall only reproduce the first, which was:

1. That the honourable court be pleased to issue special directions to the administrator general regarding the administration of the estate of the late Steven Pius Mallya on the following: -
 - i. To include the Applicant (as the legal wife) of the deceased to the list of the heirs and beneficiaries of the estate of the late Steven Pius Mallya.
 - ii. To direct the Administrator General to restore her interests in the estate of the late Steven Pius Mallya.
 - iii. To consider the children of the deceased with majority age as participants to attend every meeting scheduled and not under the deceased's wife auspices.

The said Application was met with a hurdle, whereby the 2nd Respondent raised a Preliminary Objection on a point of law that the Application was hopelessly time barred. The basis of the Preliminary Objection was that the

Application was made after the 60 days provided under Item No. 21 of Part III of the Schedule to the Law of Limitation Act, CAP 89 RE 2019 (hereinafter the LLA).

In the submission in support of the Preliminary Objection, the 2nd Respondent argued that the matter was time barred, what the Application was seeking accrued to a cause of action immediately after the Appointment of the 1st Respondent on 30 June, 2017. The Appellant could not bring a suit seeking the prayers that she was, for she was time barred. They pointed out clearly that since there is no provision relating to time in the Probate and Administration of Estates Act, CAP 352 RE 2019 (hereinafter the PAEA) or the Administrator General (Powers and Functions) Act, CAP 27 RE 2019 (hereinafter the AGA) and since the Application was of a civil nature then the LLA was the applicable law. It was further submitted that, by virtue of Item No. 21 of Part III of the Schedule to the LLA; if there is no written law stating when an Application should be filed then the same should be filed within 60 days. Citing **Anna P. Matei (As the Administrator of the estate of the late Alfred P. Matei) v. Julius W. Mmbando and Others**, Misc. Civil Land Application No. 179 of 2021, High Court, Tanga (Unreported) the

submission beseeched the District Court to dismiss the Application as provided for in section 3(1) of the LLA.

In the District Court, the Appellant's submission pivoted on the fact that the 1st Respondent had not yet performed the duties as required of an administrator, six months had lapsed and there was no application for extension on time, thus, necessitating her to seek the remedies she was seeking as they were the only available remedies. The Appellant submitted that the Application was properly before the court and there was no provision specifically for the time limit within which such Application should be filed. She submitted that the 2nd Respondent wrongly sought refuge in Item No. 21 of the Schedule to the LLA because, that provision is for Applications in which the court has determined the matter on merits and has become *functus officio* therefore, it could not be applicable in the circumstances. In addition, the Appellant relied on section 30(1) of the AGA which provides that upon an application the court may give any general or specific direction(s) as to an estate in the charge of the Administrator General or in regard to the administration of an estate. The submission further contends that the provision does not have a time limit upon which the court can issue such directive(s), which basically means so long as the administration has

not been finalized the directives can be issued. She went on to submit that there is no specific time limit set within which an Application for seeking the courts direction on a probate that it's inventory has not been filed and it would be inappropriate to do that since the Administrator General is not subjected to the six months period that everyone else is thus, the 60 day limit cannot be applicable in such a situation. Further, she argued that, had she applied for revocation of the letters of Administration granted to the 1st Respondent (the Administrator General), the Preliminary Objection would be meritorious if made under section 17 of the AGA. With that, they urged the court to dismiss the Preliminary Objection and for it to hear the matter so as to issue the requisite directives as sought.

The District Court sustained the Preliminary Objection and dismissed the Application on the ground that it was time barred. Aggrieved by this result the Appellant preferred this Appeal giving four grounds of appeal to wit:

1. That the court erred in fact and law in deciding that Misc. Civil Application No. 125 of 2021 was filed out of time.
2. The court erred in fact and law by not addressing the prayers sought in Misc. Civil Application No. 125 of 2021.

3. The court erred in fact and law by not rendering orders that would have occasioned justice to the parties.
4. The court erred fact and law by not ordering equal distribution of the estate of the late Steven Pius Mallya amongst the heirs after the deduction of half of the estate that is due to the widow who is the co - owner with the deceased as a legal wife in married on 26 November, 1994 in the Christian form.

It is from the foregoing grounds that the Appellant sought to have the order, proceedings, judgement and decree of the District Court set aside. She also prayed that this court orders a fresh hearing of Misc. Civil Application No. 125 of 2021 before another Magistrate, that each party bear its own costs and any other relief that the court shall deem fit.

On the day set for hearing, the Appellant had the services of Mr. Emmanuel Machibya learned advocate while the 2nd Respondent enjoyed the services of Mohammed Mkali, also learned advocate who was also holding brief of Mr. Salvious Rwechungura who was to appear for the 1st Respondent.

Supporting the Appeal, the Appellant's advocate submitted on all four grounds of appeal albeit combining the second and third grounds. As regards

the first ground the learned advocate submitted that the trial court erred in finding that the Application was filed out of time. He went on to submit that the said Application was seeking the revocation of the Administrator General as the administrator of the estate of the deceased on the basis that since his appointment he had neither identified or distributed the estate to the beneficiaries, in essence failing to administer the said estate.

The learned advocate submitted that the trial Magistrate used Item No. 21 in Part III to the Schedule of the LLA to decide that the Application for revocation was to be within 60 days. This is not the case in matters of probate and administration of estates since such applications are governed by the PAEA. The advocate went on to argue that section 82 of the PAEA states that any person can apply to the court for the revocation of a grant of letters where one is dissatisfied with the conduct of the administrator. The said provision does not have a time limit for such an application, it only states that there should be reasonable grounds. Further, the learned advocate contented that section 107 (6) of the PAEA states that the Administrator General's appointment cannot be revoked for failure to file an inventory within 6 months except where the court so directs. He continued to explain that the Appellant's appointment to administer the estate of the late Steven

Pius Mallya was revoked on the ground that there would be no just distribution to the beneficiaries. The 2nd Respondent herein was the Applicant in the Application for revocation and the one that proposed that the Administrator General be appointed the administrator of the said estate. The learned advocate passionately argued that Administrator General's failure to administer the estate is what lead to the filing of Misc. Application 125 No. 2021 before the Temeke District Court in which the Appellant herein sought the revocation of the grant and it is on that basis that he submits that the said Application was filed within time and the order to dismiss it should be quashed.

As regards the second and third grounds that were submitted concurrently, the learned advocate argued that the basis of the decision that dismissed Misc. Application 125 No. 2021 was a point of Preliminary Objection that was filed by the 2nd Respondent who is the mother of two beneficiaries of the deceased's estates. So, in effect, she is also seeking justice for the children she had with the deceased. However, in filing the Preliminary Objection, she, was not representing the interests of the beneficiaries since she would have wanted the matter to come to an end in a manner that benefits the

beneficiaries. He went on to explain that even the first administrators' appointment was revoked on application by the 2nd Respondent.

On the fourth ground the learned advocate submitted that this court should consider section 27 of the Indian Succession Act of 1865(hereinafter the ISA); which states that one third of the property (estate) goes to the widow if there are lineal descendants and if there are no lineal descendants then one half goes to the widow. He went on to say that this is the law that is used when distributing the estate of a deceased Christian person and in Misc. Civil Application No. 125 one of the issues was that the Administrator General should consider this legal provision while distributing the said estate, this was never considered by the trial court. He then concluded by asserting that they pray that this Court orders that the Application that was dismissed for allegedly being time barred be heard by another Magistrate in addition to granting what is in the memorandum and that each party bears their own costs.

When it was their turn, the learned advocate for the 2nd Respondent who also submitted on behalf of the 1st Respondent began his submission by stating that the Appeal had no legal or factual merit and should therefore be dismissed. In their view the decision that was being Appealed against had

only one issue that was decided on by the court that is; the Application was time barred. The learned advocate went on to submit that it is not true that the Application before the District Court was for the revocation of the grant of letters of administration to the 1st Respondent, what was before the court were the prayers in the Chamber Summons as reproduced on page 7 of the typed Judgment of the District Court. He went on to argue that if the basis of the Applicant's submission is the issue of revocation, then all the submitted points are lacking in merit and logic and in any case the Application in the District Court concerned the 2nd Respondent and not the Administrator General therefore the Application for revocation of the grant would not concern her. He averred that although that is the case, she is the one that filed the Preliminary Objection that led to this Appeal.

The learned advocate continued to argue that the learned Magistrate was correct in making the decision that he made since the complaints in the Application were known to the Appellant since 2017. She should have not waited until June 2021 to file the Application, since the law of limitation was not waiting for her. He contended that since the Application was of a civil nature then the LLA was applicable and by virtue of Item No. 21 Part III of the Schedule to the LLA if there is no written law stating when an application

should be filed then the same should be filed within 60 days. He added that in effect, the learned advocate for the Appellant is correct, the PAEA does not prescribe a time limit, therefore such applications go to the Item 21 basket in the LLA making it time barred and the law has no mercy for time barred applications as per section 3(1) of the LLA which provides for dismissal regardless of the defence. The learned advocate prayed that this court dismisses the first ground of appeal since the District Court indeed lacked the jurisdiction to entertain the Application for it was time barred.

As regards the remaining grounds of appeal the learned advocate passionately submitted that they are not correct grounds of appeal against the said decision since they were never actually heard and decided upon by the District Court. He stated that they will not submit anything on the said grounds as it would be misuse of the court's time. He concluded that their prayer is for the appeal to be dismissed with costs because there is no legal basis for the same, what's more the Appellant is in a habit of making Applications as a delay tactic.

In his brief rejoinder, the learned advocate for the Appellant explained that although the Respondents submitted that as per the LLA, the Application was time barred and the only remedy was to dismiss it nothing else. He went

on to say that, section 107 (6) of the PAEA provides that the same does not apply to the Administrator General unless otherwise directed by the Court, this makes it impossible to account for the time within which the Appellant would have filed the Application. In his view, the 60-day time limit cannot be established since there is no known start date. As regards to the issue of the revocation of the grant of the letters of administration, the nature of the Application was for the Applicant to get directives from the court since the Administrator General does not have an end date for the administration as none is prescribed. He further explained that the contents and prayers sought on page 7 of the typed Ruling the learned advocate for the Respondent's referred the court to make him conclude that Item 21 of the LLA does not apply and in effect the Application was not time barred.

Having heard the submissions of both learned counsels for and against the Appeal and after carefully going through the lower court's records I am of the opinion that the only issue for me to determine is whether this Appeal is meritorious. In doing so it is important to go back to the core of the Application that was before the District Court and resultant decision, juxtapose the same with the grounds upon which this Appeal is preferred.

It is my considered view that it is only the first and second grounds of Appeal that can be called correct grounds of Appeal to borrow the words of the learned advocate for the 2nd Respondent. The outstanding grounds are based on matters that have not yet been heard and decided upon by the trial court and in that regard, there is nothing to Appeal against, I therefore will not belabour on the same. It is also my considered view that the first ground of Appeal also disposes of the second ground for they are somewhat interrelated.

Delving right into the first ground, as rightly observed by the District Court in its decision as well as the learned advocate for the 2nd Respondent in this Appeal none of the issues that the Applicant was seeking special directions on involved the revocation of the grant of letters of administration to the 1st Respondent or the filing (or the lack of) the inventory by the 1st Respondent. In the prayers that I have reproduced *supra* the Applicant was seeking to be restored and included as one of the heirs, as the legal wife of the deceased, thus, having an interest in the estate and for the children who are of age of majority to be independent participants in meetings. This is what the Applicant sought in the District Court. I agree with the District Court and the learned advocate for the 2nd Respondent that all of these prayers; if there

was need to; should have been made soon after the appointment of the 1st Respondent that is 30 June, 2017.

The learned advocate for the Appellant argued that there cannot be a time limitation and it would be absurd so to speak, to have a time limitation for the Administrator General to file an inventory thus, the said application cannot fall within the ambit of Item No. 21 of Part III of the Schedule to the LLA. What the Appellant (then Applicant) prayed for had nothing to do with the 1st Respondent not filing an inventory or praying for the same to be filed vide the court's directions. And, even so, for avoidance of doubt section 107 of the PAEA is clear that the Administrator General is not obligated to file inventory and accounts unless the court so directs. Had the Appellant prayed for directives from the court that the 1st Respondent be directed to file inventory and or accounts of the estate; the outcome would have been different at least with regards to that particular prayer. Then, they would be right that the LLA would not be applicable since the Administrator General is not required by law to exhibit an inventory or account of the estate within the stipulated periods as provided for in section 107 of the PAEA thus, the argument that the Application falls within Item No.21 of Part III of the Schedule to the LLA would hold no water. As it is the prayers that the

Applicant took to the District Court do fall within Item No. 21 of Part III of the Schedule to the LLA.

I see it prudent to address the learned advocate for the Appellant's assertion that because of section 107 (6) of the PAEA it is impossible to account for the time within which to file an application. This would be true only if the said application was in fact seeking for an order to give directives to the Administrator General as regards filing an inventory or a related matter. The Administrator General albeit not having an end date for the administration as none is prescribed or being subjected to the provisions of section 49 of the PAEA is however subject to any directions given by the court as provided for under section 65 and 107(6) of the PAEA. The same is also provided for under section 30 of the AGA. While all of these sections use the language of "any general or special directions as to any estate in his charge(that of the Administrator General), or in regard to administration of estate." They do not, in my view envisage an open ended direction seeking and giving as to the administration or the estate in question. For instance, the directions sought would be around the duties and powers of the administrator or some actions by the Administrator General in the course of his functions. These

are the sort of directions where one can vehemently argue that they cannot be limited by the LLA since the administration of the estate is ongoing.

To buttress my point of view, I take note of the provisions of Rule 105 of the Probate Rules GN No 369 of 1963 which reads:

"An application to the court for directions to an executor or administrator in regard to the estate or in regard to the administration thereof shall be by chamber summons supported by an affidavit giving full particulars of the directions sought and reasons for the same."

The above Rule is very clear, when one is making an application for directions to an administrator or executor, they have to give full particulars of the directions sought and the reasons for the same. This means the court does not just give directions willy-nilly, it has to ascertain the reasons for the directions sought. In the Appellant's Chamber Summons, she sought directions on the three items already reproduced *supra*. In her Affidavit, she deponed on what the learned advocate termed as misconduct of the 1st Respondent. The only reference to the 1st Respondent not filing an inventory is in Paragraph 7 of the Affidavit. The said Affidavit contains other averments that may have warranted directions to be sought many of which are allegations against the 1st Respondent's maladministration of the estate.

These averments however are not in any way connected to any of the items listed in Paragraph 1 of the Chamber Summons. To be specific; the Appellant sought to be heard upon an application on the following orders:

*"That the honourable court be pleased to **issue special directions** to the administrator general regarding the administration of the estate of the late Steven Pius Mallya on the following...."*

By specifying the three items she was seeking the special directions to be given on, she had in a way confined the directions, if any, to only those three items. As already stated, the Appellant neither prayed for orders to have the 1st Respondent be directed to exhibit the inventory of the estate nor for the revocation of the appointment of the Administrator General as the advocate for the Appellant is suggesting. Appellant sought for the orders in the Chamber Summons as supported by the Affidavit she deposed.

It is trite law that parties are bound by their pleadings; this has been the subject of many decisions including; **YARA Tanzania Limited v. Charles Aloyce Msemwa and 2 Others**; Commercial Case No. 5 of 2013, High Court of Tanzania (Commercial Division) at Dar es Salaam (unreported); **James Funke Ngwagilo v. Attorney General**, [2004] TLR 161 and

Barclays Bank (T) v. Jacob Muro, Civil Appeal No. 357 of 2018, Court of Appeal of Tanzania (unreported).

In her submission to the District Court the Appellant did not dispute that the cause of action accrued when the Administrator was appointed, to which she was aware. The prayers as presented in the Chamber Summons should have been made when the course of action accrued. In effect, section 3(1) of the LLA comes to play.

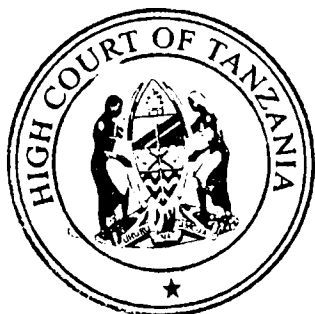
The learned Magistrate upheld the objection raised because the consequences of filing the said Application out of time are expressly provided for in section 3 (1) of the LLA which we produce hereunder:

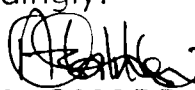
'Subject to the provisions of this Act, every proceeding described in the first column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.' [emphasis supplied].

Regarding the lapse of limitation period, the Court of Appeal of Tanzania in the case of **NBC Limited and IMMA Advocates vs. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019 (unreported) had this to say:

'It is that courts are enjoined not to entertain matters which are time barred. Limitation period has an impact on jurisdiction. Courts lack jurisdiction to entertain matters for which limitation has expired'[emphasis supplied]

By virtue of the Application being time barred, the District Court had no jurisdiction to entertain it. In the event, I am satisfied that the trial Magistrate properly analyzed the reached an appropriate conclusion hence there is no justification to interfere with the said decision. The Appeal is dismissed. Because of the nature of the matter and the parties' relationship(s), I make no order as for costs. Order accordingly.

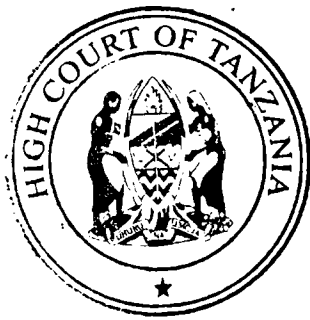


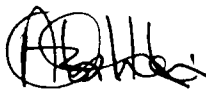

A.A. OMARI

JUDGE

07/03/2023

Judgment delivered and dated 07th day of March, 2023 in the presence of the Mr. Emmanuel Machibya, learned counsel for the Appellant; Ms. Clementina Rishela, learned State Attorney for the 1st Respondent and the 2nd Respondent who appeared in person. Right of appeal explained.




A.A. OMARI

JUDGE

07/03/2023