

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

MISC. CIVIL APPLICATION NO. 427 OF 2022

(Originating from Misc. Civil Application No. 571 of 2018)

IN THE MATTER OF THE ESTATE OF THE LATE WILFREM ROBERT MWAKITWANGE

AND

**IN THE MATTER OF APPLICATION FOR REVOCATION OF THE
ADMINISTRATOR GENERAL (as personal representative of the estate of the
late WILFREM ROBERT MWAKITWANGE**

BY

DAVID WILFREM MWAKITWANGE (the deceased's next of kin).....APPLICANT

VERSUS

**ADMINISTRATOR GENERAL as a Legal Personal Representative
of the Estate of the late WILFREM ROBERT MWAKITWANGE.....RESPONDENT**

RULING

Date of Last order: 05/07/2023

Date of ruling: 28/07/2023

E.E. KAKOLAKI, J.

In this application the Court has been moved by the applicant under sections 49 (1) and 8(b) of the Probate and Administration of Estates Act, Cap 352 [R.E 2002], Rule 29(1) of the Probate Rules GN. No. 10 of 1963 and any other enabling provisions, for orders of revocation of grant of administration to the Administrator General to administer the estate of the late Wilfrem Robert Mwakitwange for failure to perform her duties, costs of this

application and any other order that this Court may deem fit to grant in the circumstance of this case.

The application is supported by an affidavit sworn by the applicant stating the chronological events and the reasons for the application. When served with the application the Respondent filed the counter affidavit duly sworn by Samwel C. Mutabazo, her principal officer strenuously resisting the applicant's prayers.

Briefly as it can be gathered from the ruling in Misc. Civil Application No. 571 of 2018 in which this application originates, the respondent was appointed by this Court to administer the estate of the late Wilfrem Robert Mwakitwange on 23rd May, 2014, in lieu of co-administrators formerly granted with letters of administration which were revoked. Since then she has been in administration of the estate of the late Wilfrem Robert Mwakitwange. It is however noted in that there has been an attempt to remove her from the office by some of the heirs the last applications being Misc. Civil Application No. 571 of 2019 in which an order was made by this Court on 14th December 2020, for the respondent to exhibit an inventory within 3 months and close the estate within 6 months. It is from that order of the court which the

applicant is claiming not to have been complied with, thus this application has been preferred.

When the matter was called for hearing both parties appeared represented and were heard viva voce. The applicant employed legal served of Ms. Mainda Omary, learned counsel whereas the respondent enjoyed the services of Mr. Swalehe Njoma, learned State Attorney. It is Ms. Omary who staged the floor first and argued that, the application was preferred under section 17 of the Administrator General (Powers and Functions) Act [Cap 27 R.E 2002] providing for manners under which the respondent can be appointed and removed from the office of administration of estate. She said, it is the requirement under the law that, application for removal of the respondent must be preferred by the next of kin within six (6) months of grant of the respondent with powers to administer deceased estate in which the applicant complied with, as he filed this application after the two other applications were heard and disposed of before this Court (Justice Dr. Masabo). She mentioned the two applications to be Misc. Civil Application No. 571 of 2018 in which this application originates and Misc. Civil Application No. 572 of 2019 which were disposed off on 14/12/2020 and 16/07/2020 respectively.

It was Ms. Omary's submission that, the reason as to why this application for revocation of the respondent is preferred is her failure to comply with the order of this Court of 14/12/2020 in Misc. Civil Application No. 571 of 2018 for her to exhibit an inventory of the estate within three (3) months of the ruling date and close the estate within six (6) months. She had it that, since the respondent has unjustifiably failed to comply with the Court's order it is now an opportune for this Court to intervene and remove her from the office, so as to pave way for another administrator to be appointed to accomplish the duty. She therefore urged the Court to grant the prayers as sought.

In rebuttal Mr. Njoma preceded his submission by contending that, the application is incompetent as it is already held by this Court in Misc. Civil Application No. 571 of 2018 (Masabo, J) that, under section 49(2) of the Probate and Administration of Estate Act, [Cap. 352 R.E 20002], the applicant could not move this Court to remove the respondent. He then adopted the counter affidavit to form part of his submission and proceeded to argue that, the cited section 17 of the Administrator General (Powers and Functions) Act, [Cap. 27 R.E 2002] as enabling provision is a total misdirection to the Court for being contrary to the provisions of section 49(2) and 8(b) of the Probate and Administration of Estate Act, as cited in the

chamber summons which is initiating this application. According to him the Court has not been properly moved to grant the orders sought hence prayed the Court to strike out this application on the basis of that incurable defect. In his further submission Mr. Njoma contended assuming the Court is properly moved under section 17 of Cap. 27, the requirement is that, applications of this nature for removal of the respondent must, one, be filed within six months of the appointment of Administrator General as administrator of the estate and secondly, the applicant must be unaware of her/respondent's appointment at the time of such appointment. He had it that, the applicant herein failed to comply with either of the two conditions which must be complied with conjunctively. In the same beats the learned State Attorney also argued that, the application is filed out of time almost eight (8) years passed since the appointment of the respondent as administrator in the year 2014. He said, even if for the sake of argument, the application was filed soon after the last ruling of 14/12/2020 in which this application purports to originate from, still under the conditions provided under section 17 of Cap. 27 were never fulfilled by the applicant hence rendering the application incompetent liable to be dismissed for being filed out of time and so prayed the Court to find and order accordingly.

Last in submission by Mr. Njoma was on the grounds for revocation of the respondent as argued by Ms. Omary. He said, it is not true that the respondent had failed to comply with court's order of 14/12/2020 in Misc. Civil Application No. 571 of 2018, as there were unwarranted and endless disputes amongst the family members of the late Wilfrem Robert Mwakitwage that affected the respondent in the course of discharging his duties in the office as administrator of the estate. Some of the disputes he mentioned are for some of family members to disown other family members and the institution of Land Case No. 51 of 2021 before the DLHT for Kinondoni District by the applicant against the respondent in which its hearing is scheduled on 28/07/2023. It was therefore his submission that, once the said disputes are resolved then the respondent will be able and is prepared to exhibit the inventory of estate and close the probate as ordered by the Court. In view of the above submission he prayed for dismissal of the application.

In her rejoinder submission Ms. Omary recanted the submission by Mr. Njoma as held by the Court that, the applicant cannot seek to revoke the respondent under section 49(2) of the Probate and Administration of Estate Act, on the ground that if the court has appointing powers then it retains

revocation powers as well. On the wrong citation of the enabling provision Mr. Omary while conceding to the submission raised by Mr. Njoma, she was quickly to respondent and pray to the Court not to be bound by the technicalities when entertaining parties disputes as dictated in Article 107(2)(e) of the Constitution of the United Republic of Tanzania, 1977, and that is why she cited the provisions of section 17 of Cap. 27 to move the Court for the sought orders.

With regard to the submission that, the application has been filed outside the time limitation it is her response that, the same is misplaced as that issue was not raised even the two applications formerly filed in Misc. Civil Applications No. 571 of 2018 and Misc. Civil application No. 572 of 2019, believingly for avoidance of technicalities thus should be disregarded as the application is not time barred though the applicant was aware of the appointment of the respondent. On the submission that, family disputes and pending case have impeded the respondent to discharge her duties in the office she said, the assertions are unfounded as the respondent had ample time to resolve them as administrator but she failed to so act, and that is the reason her revocation is sought in this application. Otherwise she reiterated

her submission in chief and invited the Court to grant applicant's prayers with costs.

Having accorded the deserving weight to the submission by the parties and navigated through the pleadings, I wish to start by addressing first the raised issue by Mr. Njoma and affecting the jurisdiction of this Court to the effect that, the applicant improperly moved the Court for citing the provision of section 49(2) of Cap. 352 R.E 2002, in which this Court held the applicant could not invoke it to remove the respondent from the office or revoke her appointment. I think this issue need not detain this Court much as it is true and rightly submitted by Mr. Njoma and conceded by Ms. Omary this Court in Misc. Civil Application No. 571 of 2018, held that the provisions of section 49(2) of Cap. 352 could not be invoked to revoke respondent's appointment. The reasons for such decision is simple in that the law applicable and providing the manner in which the respondent can be appointed and have her appointment challenged is provided under Cap. 27 as rightly submitted by Ms. Omary. Now the pertinent question is whether by citing section 49(2) of Cap. 352 for the sought order for revocation of the respondent's grant of appointment as administrator of the estate of the late Wiffrem Robert Mwakitwage this Court ceases to have jurisdiction to entertain the

application. I would answer the issue in negative as in the awake of oxygen principle in our jurisdiction, it is now settled law that wrong citation of the provisions of the law is not fatal in as far as the Court has jurisdiction to entertain the matter before it. As rightly submitted by Ms. Omary article 107A(2)(e) of the Constitution of the URT, 1977, promotes resolution of parties disputes in courts of law without being bound by technicalities. See also the cases of **Joseph Shumbusho Vs. Mary Tigerwa and 2 Others, Civil Appeal No. 183 of 2016** (CAT) and **MIC Tanzania Limited and 3 Others Vs. Golden International services Limited**, Civil Application No. 1/16 of 2017. Applicant's negligence in citing the law is fortunately saved by Ms. Omary's act of mentioning the proper section and law during submission in which the Court derives its power to entertain the application as section 17 of Cap. 27. In view of the above therefore I find this Court has jurisdiction to entertain the application.

Next for determination is whether the application is time barred as submitted on by Mr. Njoma. It is his submission that, for the applicant to successfully file the application of this nature under section 17 of Cap. 27 two conditions must be met in which the applicant failed to do. **One** that, as executor or next of kin he was not aware at the time when the respondent was appointed

as administrator of the estate and **second** that, the application is preferred within six (6) months of the appointment of the respondent. Ms. Omary is of the view that, this Court should disregard the requirements as the same were not raised on the two applications formerly filed hence it is brought at this stage to employ technicalities so that the applicant cannot be heard on his genuine claims. It is the law under section 17 Cap. 17 that, an executor or next of kin to the deceased who establishes to the Court's satisfaction that was unaware of the appointment of the Administrator General for not being served with notice or had no actual notice of appearing before the Court during appointment may within six months of such appointment bring an application for revocation of the said Administrator General's appointment as administrator of estate of the deceased. The said section 17 of Cap. 27 reads:

17. If an executor or next-of-kin of the deceased who has not been personally served with a notice or who has not had actual notice in time to appear pursuant to that notice, establishes to the satisfaction of the court a claim to probate of a will or to letters of administration in preference to the Administrator-General, any letters of administration granted in accordance with the provisions of this Act to the Administrator-General may be revoked, and probate or letters of administration may

be granted, to such executor or next-of-kin, as the case may be: Provided that letters of administration granted to the Administrator-General shall not be revoked under this section, upon the application of the next-of-kin of the deceased, unless such application be made within six months after the grant to the Administrator-General and the court is satisfied that there has been no unreasonable delay in making the application, or in transmitting the authority under which application is made.

From the above disposition of the law it is clear to and I would agree with Mr. Njoma's submission that, for the applicant to successfully apply for revocation of the Administrator General two conditions must be fulfilled.

One, that, the applicant is an executor or next of kin to the deceased and that at the time of proceedings and grant of appointment of administration to the Administrator General he was not served with a notice or no notice of actual appearance was issued to him. **Second**, the application is filed within six months' time of the grant of administration to the Administrator General and I would add **thirdly**, must prove to the Court's satisfaction that the application has been preferred promptly.

In the present matter it is uncontroverted fact that, the grant of administration to the respondent as administrator to the estate of the late Wilfrem Robert Mwakitwage was done way back 2014 and this application

preferred on 29/09/2022, eight (8) years passed. It is also undisputed fact that, when the Court granted the same to the respondent the applicant was aware as rightly submitted by Ms. Omary but did not come forward to challenge her appointment within six months of the grant as per the requirement of the law. The submission by Ms. Omary that, this issue of time limitation was not raised in the two formerly filed application hence employment of technicalities and delay to the applicant in pursuing his rights, with due respect to her I disassociate myself from her proposition for one good reason that, in the said two applications formerly filed in this Court, the Court was not moved under the provisions of section 17 of Cap. 27 in which the requirement of filing of the application within six (6) month of the respondent's appointment is a mandatory. Much as the application was preferred eight (8) years passed with full knowledge of the respondent's appointment by the applicant since the year 2014, I find this application was filed out of time. Assuming for the sake of argument the applicant had to wait for determination of the said two applications by his siblings so as to prefer the present one, reckoning from 14/12/2020, when the last application Misc. Civil Application No. 571 of 2018 was disposed of, still I would hold the application is time barred for being more than 30 months

passed. In view of the above deliberation and reasons I would hold the above issue is answered in affirmative that, the application by the applicant is time barred.

With the above findings the last question would be what remedy is for the suit filed outside the time limitation. It is the settled law that any suit preferred outside the time prescribe by the law shall be dismissed. In this matter as alluded to above, no doubt the same was filed more than six months' time and in contraventions of the time limitation as provided under the proviso of section 17 of Cap. 27. The only available remedy therefore is to dismiss the same which order I hereby enter.

Basing on the nature of the case and the parties involved who are of the same family in promoting peace and harmony amongst them I make no order as to costs.

Ordered accordingly.

Dated at Dar es Salaam this 28th July, 2023.



E. E. KAKOLAKI

JUDGE

28/07/2023.

The ruling has been delivered at Dar es Salaam today 28th day of July, 2023 in the presence of the applicant in person, Ms. Emmanuela Mwingira, State Attorney for the respondent and Mr. Oscar Msaki, Court clerk.

Right of Appeal explained.



E. E. KAKOLAKI
JUDGE
28/07/2023.

