**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MOSHI DISTRICT REGISTRY**

**AT MOSHI**

**PC PROBATE APPEAL NO. 10 OF 2023**

(Arising from Probate Appeal No. 3 of 2022 of Rombo District Court at Mkuu, Originating from Probate and Administration Cause No. 16 of 2020 of Mengwe Primary Court)

**CORNEL KOMBERE SHAO ..... APPELLANT**

VERSUS

**GERMANA WILBARD SHAO ..... RESPONDENT**

**JUDGMENT**

*09/10/2023 & 20/11/2023*

**SIMFUKWE, J.**

This is the second appeal by the appellant herein Cornel Kombere Shao. Before the trial court, the respondent herein successfully petitioned for letters of administration to administer the estate of his deceased son Prosper Wilbard Shao who died intestate on 04/07/2011. The appellant herein unsuccessfully applied for revocation of the appointment of the respondent. Thereafter, he preferred Probate Appeal No. 03 of 2022

before Rombo District Court on four grounds which were summarized into two grounds by the first appellate court, as follows:

1. *That, the learned Primary Court Magistrate erred in law and fact by contravened (sic)* ***section 7(1) of the Magistrates' Courts Act, Cap 11 R.E 2019.***
2. *That, the learned Primary Court Magistrate erred in law and fact by acting upon a purported will which is not original.*

The first appellate court found the two grounds of appeal meritless and upheld the decision of the trial court. Still aggrieved, the appellant filed the instant appeal on four grounds of appeal:

1. *That, the first appellate court erred in law and fact by failing to be meticulous enough to notice that the trial Court failed to comply with the then mandatory provisions of* ***section 7(1) of the Magistrates' Courts Act [Cap 11 R.E 2019].***
2. *That, the first appellate Court erred in law and in fact by failing to be painstaking to analyze that there's palpable typing error on the face of the record of the trial court which indicated the judgment of the appellant's application was delivered on 6th day of May, 2022 three months before the appellant lodged his application on 4th day of August, 2022.*

3. *That, both the trial court and the first appellate court erred in law and in fact by failing to attach weight to the respondent's delay in petition (sic) for letter of administration neither did consider the respondent's failure to account for the delay after twenty years.*
4. *That, both the lower court (sic) erred in law and in fact by failing to decide on both validity and legality of the document purported to be a will due to the fact that Nicas Kombere Shao the blood brother of the appellant during his life time left no property to be administered / inherited.*

The appellant prayed that the decisions of the lower courts be quashed and the appointment of the respondent be revoked with costs.

The appeal was ordered to be argued by way of written submissions on the reason that both parties were unrepresented.

Arguing the first and second grounds of appeal that relate to non-compliance to the then mandatory provisions of **section 7(1) of the Magistrates' Courts Act** (supra), the appellant submitted among other things that the first appellate magistrate failed to wore shoes of his size by his failure to re-hear the case guided with the case of **D. R. Pandya v. R [1957] E.A 336.** He said that the first appellate Magistrate failed to give an in-depth scrutiny to the proceedings of the trial court as there was

a typing error in respect of the date of filing an application for revocation. The appellant referred at page 3 of the judgment of the first appellate court where it is indicated that, after reading the trial court record, the appellate Magistrate noticed that, the appellant filed his application on 04th August 2022 while judgment in respect of the same was delivered on 06/05/2022. He explained that, the first appellate magistrate failed to note that this matter was tried before the said **Written Laws (Miscellaneous Amendments) (No. 3) Act, 2021** came into force. The said application was filed on 4th August 2021. That, as the law then stood, it was irregular for the trial court to completely abandon the assessors, thus the trial court was not properly constituted while hearing the appellant's application. The appellant cemented his submission by quoting **section 7(1) and (2) of the Magistrates' Courts Act** (supra), which required the primary court to sit with not less than two assessors.

The appellant was of the view that the pointed-out irregularities were serious and affected the entire proceedings of the trial court. That, under the said law the Magistrate was required to consult the assessors with the view of reaching a decision of the court as held in the case of **Mariam Ally Ponda v. Kherry Kissinger [1983] T.L.R 223** in which it was held that:

*".....Assessors in the primary court are not mere advisors as elsewhere. Their powers in a trial and the powers of the magistrate are almost equivalent and certainly complementary. It is then not out of the courtesy or compliment that their identities appear on the record, it is because of the responsibility they share in court's decision.* ***Further, an appellate court would always desire to satisfy itself that the proceedings below were conducted with due regard to law and procedure."*** Emphasis added

Further reference was made to the case of **Abdallah Bazamiye and Others v. R [1990] T.L.R. 42** (CAT), which held that:

*"(iii) Assessors full involvement in the trial is an essential part of the process, its omission is fatal and renders the trial a nullity."*

On the third and fourth grounds of appeal, the appellant faulted the two courts below, for failure to attach weight to the respondent's delay to petition for letters of administration, respondent's failure to account for the delay and that Nicas Kombere Shao left no property to be inherited. The appellant informed this court that, on 16/09/2020 there was a document which was tendered by the respondent as exhibit alleged to be written by Nicas Kombere Shao the blood brother of the appellant who died on 11/07/2001. The said document directed the properties of Nicas

Kombere Shao to be taken by the son of the respondent one Prosper Wilbard Shao who died intestate. It was argued that, it was improper for a probate petition to be filed after expiry of 20 years since the death of Nicas Kombere Shao. The argument was supported with the decisions of this court in **Masanja Luponya vs Elias Lubinza Mashili, PC Probate Appeal No. 01 of 2020,** High Court at Shinyanga, at page 8; and **Probate and Administration Cause No. 03 of 2019,** in the matter of the Estate of the Late Noela Songo Nyekaji and In the Matter of Application for Letters of Administration by Majura Songo Nyekaji, High Court at Musoma at page 2 of the ruling of the Court. The cited decisions of the High Court were supported with the Court of Appeal decision in **Mwaka Mussa and Simon Obeid Simchimba, Civil Appeal No. 45 of 1994**, (C.A.T) at Dar es Salaam, in which at page 8 the Court had this to say:

> *"We agree with Mr. Maira's submission that in view of section 31 (1) of the Probate and Administration Ordinance, Cap 445 the Law of Limitation Act, 1971 is not strictly applicable in matters of probate or administration filed after expiration of three years from the death of the deceased, the petition shall contain a statement explaining the delay."* Emphasis added

The appellant concluded that, from the above cited cases, the position of the law as it stands now, is that under the **Law of Limitation Act**, no period is prescribed within which an application for grant of letters of administration must be made, but delay beyond three years after the death of the deceased as in the case at hand, there must be a statement explaining the delay by the intending applicant. That, the above authorities render decisions of both lower courts null and void. The appellant was of the opinion that, the essence behind the above quoted authorities is to avoid the possibility of forging documents which may lead to miscarriage of justice to some people like the appellant in this case. He said that, this was among the framed-up cases.

In her reply submission, the respondent stated that the appellant was seriously misleading the court. She said that, it seems that the intention of the appellant is not to appeal against the decision of the first appellate court, rather to make the respondent incur further costs by challenging the current laws. She submitted that; the amendment seems to be made before the date of the second proceedings of Mengwe primary court were conducted. That, the appellant knocked the doors of the trial court on 04th August 2022 after the law had already been amended. The appellant had

not attached copy of proceedings to prove that the second trial Magistrate received his application for revocation before the new amendments.

Responding to the allegation that the respondent delayed to file the petition for appointment as administrator, the respondent averred that the same was not true. She said that **Probate and Administration Act**, and the **Law of Limitation Act** are not applicable in primary courts as primary courts are guided by **G.N No. 311 of 1961**. Hence, the cited decisions of the High Court as cited by the appellant are irrelevant and immaterial to this court. The respondent stated that, it is clear that because of the English common law doctrine of precedent which is also applicable in our legal system, decisions of higher courts are binding on lower courts. On the other hand, a judge of the higher court is not bound by the decision of his fellow judge of the same court with reasons for the departure. The same leads to existence of two schools of thoughts as it may appear on the issue of time limitation in instituting probate and administration causes in primary courts. She cited a case which has different school of thought from the cases cited by the appellant. That is the case of **Essau Asajile Makosi v. Otman Rebman Kyapokwa, Probate Appeal No. 10 of 2020**, (HC) at Mbeya. She implored this court to research on the two schools of thoughts and rely upon one among

the two schools which is in the right track of laws. She was of the view that, providing time limitation for filing applications for letters of administration of estate, would lead to endless litigations against the estate which was left without any appointed administrator.

It was replied further that, the appellant seems to challenge the integrity of the magistrate rather than the decision delivered by the same magistrate. Also, it is not understood whether the appellant's submission still supports his previous application for revocation or challenging the said deceased's will, or challenging the decisions of the courts below.

The respondent prayed that this appeal be dismissed and the decision of the trial court be upheld.

In his rejoinder, the appellant submitted that, in her reply the respondent was not meticulous enough to analyze that this matter was tried before Mengwe primary court before the said **Written Law (Miscellaneous Amendments) (No. 3) Act** came into force. He reiterated that, this matter was before Mengwe primary court since 13/8/2020 and the appellant filed his application on 04/08/2021. The ruling of Mengwe primary court was delivered on 06/05/2022 when **section 7(1) and (2) of the Magistrates Courts Act** was still operating. The appellant was of the view that the respondent was pretending that she was unaware of

the typing error on the face of the record amounting to miscarriage of justice towards the appellant. He urged this court to believe him as a credible person as there is no cogent reason of disbelieving him. He insisted that, on 04/08/2021, it was mandatory for all primary courts magistrates to comply with the mandatory provision of **section 7(1) and (2) of the Magistrates Courts Act** (supra).

On the issue of limitation period in filing application for the appointment of administrators in probate matters, the appellant faulted the respondent's argument that there is no limitation period. He contended that, although no specific period of limitation is laid down, there should be no unwarranted delay in filing such petitions for administration before the court of law. That, failure to explain the delay is fatal and renders the said petition incompetent. The explanation gives an opportunity to the court of law to gauge the genuineness of the petition for his/her late filing of the petition.

After considering the rival submissions of both parties, the grounds of appeal and the records of the trial court and first appellate court, the issue for determination is ***whether this appeal has merit***.

Starting with the first cluster of grounds of appeal which relates to non-compliance to the then mandatory provision of **section 7(1) and (2) of**

**the Magistrates Courts Act** (supra); the appellant strongly believes that his application for revocation of the appointment of the respondent, was filed before the trial court on 04/08/2021 before the requirement of sitting with assessors under the above cited mandatory provision was repealed. Thus, the act of the trial Magistrate determining the matter without the aid of assessors rendered such proceedings a nullity. The respondent was of the view that, the application of the appellant was filed while **Written Laws (Miscellaneous Amendment) (No.3) Act No. 5 of 2021** was in force. Therefore, there was no need for the primary court Magistrate sitting with assessors.

On the outset, I wish to acknowledge the typing error which was noted by the appellant in respect of the year when his application was filed. In the judgment of the first appellate court at page 3 the learned Magistrate indicated that the appellant filed his application for revocation before Mengwe primary court, on 4th day of August, 2022. According to the proceedings of the trial court, the said application was filed on 04/08/2021 while the new position of the law came into force on 11/10/2021, as rightly submitted by the appellant. Having acknowledged the said typing error, the issue is whether the trial magistrate contravened the said mandatory provision?

It is trite law that procedural law applies retrospectively. In the instant case, the record is to the effect that, assessors appeared up to 16/09/2021. The hearing of the application for revocation commenced on 07/10/2021 in absence of assessors and ended on 03/05/2022 when the ruling of the said application was delivered. With respect to the appellant, provided that his application had not been determined to finality when the mandatory provision was repealed, he was not prejudiced with the determination of his application without the aid of assessors. That position was confirmed by the Court of Appeal in the case of **Felix H. Mosha and Another vs. Exim Bank Ltd, (Civil Reference 12 of 2017) [2021] TZCA** 257 at page 8 of the ruling where it was observed inter alia that:

> *".... Three, the amendment could apply if by the time of coming into operation no decision had been made on the application."*

The retrospective application of the law was discussed thoroughly in the case of **Lala Wino vs Karatu District Council (Civil Application 132 of 2018) [2019]** TZCA 46 at page 7 and 8 it was stated that:

> *"In the premises, I am of the firm view that the amendment of* ***section 47(1) of Cap 216*** *(supra) is retrospective on two grounds: First, it pertains to the procedure governing the exercise of the right of appeal to this court in respect of a land matter arising*

*from the original exercise of the jurisdiction of the High Court. Secondly, the amendment contains no express stipulation limiting the ostensible retroactivity of that new provision.*

*In consequences,* ***even though both the judgment the subject of the intended appeal and present application preceded the amendment at hand, the applicant's intended appeal would no longer be subject to obtaining leave of the High Court to appeal to this Court****."* Emphasis added

Guided by the above cited decision in **Lala Wino** (supra), in the case at hand, I am of the same opinion that even though the probate cause the subject of this appeal and the application for revocation filed by the appellant preceded the amendment of **section 7(1) and (2) of Cap 11** (supra), the hearing of the application of the appellant would no longer be subject to the mandatory requirement of sitting with assessors. I could have been of different opinion if the application of the appellant was partly heard with the aid of assessors.

Without prejudice to what I have stated herein above, under the amended law, the appellant had an option of applying before the trial Magistrate that the hearing of his application be conducted with the aid of assessors.

**Section 52 of Written Laws (Miscellaneous Amendments) (No.3) Act No. 5 of 2021** provides that:

> "*52. The principal Act is amended by (a) repealing section 7 and replacing for it the following:*
>
> *7(1). In any proceedings in the primary court which involves customary or Islamic law the court shall, where it considers necessary in the interest of justice* ***or upon application by any party to the proceedings, sit with not less than two assessors.***
>
> *Provided that, in deciding matters, the Magistrate shall not be bound by the opinion of the assessors."* Emphasis added

In the circumstances, I find the first cluster of the grounds of appeal lacks merit.

On the third and fourth grounds of appeal; the appellant was of the opinion that both lower courts did not attach weight to the respondent's delay in petitioning for letters of administration and failure to account for the delay. He supported his opinion with the decisions of this court and the Court of Appeal decision in **Mwaka Musa and Another** (supra). The respondent was of different opinion that there is no time limitation in filing

petitions for letters of administration in probate matters. She asserted that, probate cases in primary courts are governed by the **Fifth Schedule of the Magistrates Courts Act** (supra) together with **GN No. 49 of 1971** in which no limitation has been provided for in filing applications for letters of administration. Hence, **Probate and Administration Act** (supra) and **Law of Limitation Act** are not applicable in primary courts.

Without further ado, I agree with the respondent and support the school of thought which states that there is no time limit in probate matters before primary courts. The same position was reached in the case of **Majuto Juma Nshauzi v. Issa Juma Nshauzi, PC Civil Appeal No. 9 of 2014** (Tanzlii) in which the Court stated that:

> *"There is no specific time for petitioning for the letters of administration of estate* ***and it would not be in the interest of justice to have such provision****." Emphasis added*

I also agree with the provisions of the law and case laws cited by the respondent in support of the position that time limitation in probate matters may prejudice beneficiaries.

Based on the above findings, I am of considered opinion that this appeal lacks merit. Hence, I hereby dismiss it with no order as to costs.

It is so ordered.

DATED and DELIVERED at Moshi this 20th day of November 2023.


X

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE

**20/11/2023**