

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 70 OF 2020

**(C/F CIVIL APPL. NO 79 OF 2019, CIVIL CASE NO. 9 OF 2013, ORIGINAL, PROBATE AND
ADMINISTRATION CAUSE NO. 05 OF 2009)**

MEET SINGH BHACHU.....APPLICANT

VERSUS

**1. THE ADMINISTRATOR GENERAL
2. GURMIT SINGH BHACHU }RESPONDENTS**

RULING

13/11/2020 & 26/02/2020

GWAE, J:

This ruling is prompted by preliminary objections raised by senior advocate Mr. Bharat Chadha, who is duly representing the 2nd respondent. The preliminary objections raised are on the following points of law;

1. The application for setting aside the decree dated 18.10.2019 is misconceived and time barred as well.
2. The application for setting aside/ review of final accounts of distribution of the estate of the deceased is hopelessly time barred.
3. The order of discharging the Administrator General dated 18/10/2019 is a decree in terms of section 54 Cap 27 R.E 2002 and as such, after having pronounced the decision, the court becomes

functus officio in that regard and for that reason, the same matter cannot be reopened.

4. The Court has no jurisdiction to grant relief (c) as the matter is seized by the Court of Appeal of Tanzania.
5. The application is bad in law for being an omnibus application.

Initially, the applicant above brought this application under section 43 of the Administrator General (Powers and Functions) Act (Cap 27 R.E. 2002) for the following orders;

1. That, this court be pleased to set aside its order made in Misc. Civil Application No. 79 of 2019 dated 18th October 2019 that discharged the 1st respondent from administering the estate of Gurbax Singh Arjan Ram-deceased.
2. That, the court be pleased to quash and set aside the final accounts of the estate of the said Gurbax Singh Arjan Ram-deceased that was filed in court by the 1st respondent in the said Misc. Civil Application No. 79 of 2019.
3. That, the court be pleased to differ the 1st respondent from administering the estate of the above-mentioned deceased person until the determination of a civil appeal arising from Civil Case No. 09 of 2013, now pending before the Court of Appeal of Tanzania between the applicant and the 2nd respondent.
4. That, the costs of the application be borne by the respondents.

The application is supported by an affidavit dully sworn by **Mr. Alute Simon Lesso Mughwai**, the learned senior advocate for the applicant, **Meet Singh**

Bhachu. The respondents on the other hand strongly opposed the application by filling their respective counter affidavits where the counter affidavit of the 2nd respondent was accompanied by preliminary objections which forms the basis of this ruling.

With the leave of the court the preliminary objections were argued by way of written submissions, **Mr. Bharat Chadha** and **Mr. Alute Mughwai** learned counsels appeared for the 2nd respondent and the applicant respectively. With due respect I commend both counsels for their industrious submissions and authorities which I had an opportunity to carefully go through them.

Supporting the first point of the preliminary objection Mr. Chadha submitted that the application filed by the applicant is misconceived since the 1st respondent has already been discharged as against all persons interested in the deceased's estate by section 43 of the Administrator General (Powers and Functions) Act Cap 27 R.E. 2002, therefore his office is vacated and cannot be called upon to answer any query raised by the applicant under section 43 of the Act except by way of appeal to the Court of Appeal of Tanzania or by way of a Review under Order XLII of the Civil Procedure Code Cap 33 R.E. 2019. The counsel cited the case of **Hadija Masudi** (as the legal representative of the late Halima Masudi) **vs. Rashidi Masudi**, Civil Appeal No. 26 of 1992 CAT (Unreported) **and Ahmed Mohamed**

Allamar vs. Fatuma Bakari and another, Civil Appeal No. 71 of 2012 (unreported-CAT) in order to cement his arguments.

On the second limb of the first PO, the learned counsel submitted that the application is time barred subject to be dismissed by virtue of section 3 of the Law of Limitation Act Cap 89 R.E. 2002 by stating that since the order intended to be reviewed was given on the 18th October 2019 while this application has been duly lodged on 14th July 2020 according to the counsel, since this is an application for review of a decree it ought to have been lodged within 30 days from the date of the decision as per item No. 3, column 2 of Part III of the 1st Schedule of the Law of Limitation Act.

On the 2nd point of the Preliminary Objection the learned counsel for the 2nd respondent reiterated what he has argued in the first point of the preliminary objection. The counsel is of the view that the review of the approved accounts ought to have been brought within 30 days as provided under item no. 3 column 2 of Part III of the First Schedule of the Law of Limitation Act.

Submitting on the 3rd point of the preliminary objection Mr. Chadha submitted that this court is functus officio and the same cannot be reopened under the provision of section 43 of the Administrator General (Powers and Functions) Act. Supporting this argument, the counsel cited the decision of the Court of Appeal

of Tanzania in the case of **Mohamed Enterprises (T) Limited vs. Masoud Mohamed Nasser**, Civil Application No. 33 of 2012 (Unreported).

On the 4th point of the preliminary objection, the learned counsel submitted that as pointed out by the applicant in his application that, there is a pending appeal before the Court of Appeal of Tanzania therefore this court lacks jurisdiction over the matter in particular on the relief sought by the applicant. The counsel cited a decision of the Court of Appeal in **Mohamed Enterprises Tanzania Limited vs. The Chief Harbour Master & another**, Civil Appeal No. 24 of 2015 (Unreported).

Coming to the last point of the preliminary objection Mr. Chadha argued that the application brought by the applicant is omnibus as the applicant has lumped three applications in one application. The first one is for review of the discharge order which ought to have been brought under the provisions of Order XLIII rule 1 of the CPC, the second is application for review of final accounts which ought to have been brought under section 43 (1) of the Administrator General (Powers and Functions) Act. And the third application was for stay of further execution of decree by the Administrator General which also ought to have been brought under Rule 11 (2) of the Court of Appeal Rules. The counsel went on submitting that this kind of an omnibus application is not permitted by the law and therefore urged this court to sustain the preliminary objections as submitted.

In reply to the preliminary points of objection, the applicant's counsel Mr. Mughwai submitted as follows; on the first point of preliminary objection the learned counsel submitted that this application is not misconceived as alleged by the counsel for the second respondent on the reason that the order sought to be set aside was procured in the absence of the applicant therefore this court has powers to review its own order even though the administrator has already been discharged from his duties. The applicant further argued that, the filed accounts and inventory by the 1st respondent are questionable as they included the applicant's personal properties and those that were ordered by the High Court to be excluded from administration.

On the point that this application ought to have been brought, as a review, under Order XLII of the Civil Procedure Code R.E 2019 or an appeal, the learned counsel maintained that this application has been properly filed in this court as seen in the chamber summons where the application is brought under section 43 of the Administrator General (Powers and Functions) Act, Cap 27 Revised Edition, 2002 which expressly states that in case of any objection the taxation may be brought under review by the court. Subject to this provision the learned counsel was of the view that this court is empowered to review any order resulting from the accounts.

On the 3rd point of the preliminary objection the applicant's counsel argued that this court cannot be said to be functus officio on the assertion derived from the Black's Law Dictionary that for the court to be functus officio the duties or functions must be fully accomplished. According to the counsel for the applicant, this court did not issue a certificate in terms of Subsection 2 of section 43 of the Act which requires the taxing officer or the Judge to issue a certificate satisfying itself that the accounts have been examined and found correct and thereafter discharge the administrator general. Therefore since the court did not issue the certificate, the counsel was of the view that the court did not discharge its duties fully and thus cannot be "functus officio".

As to the issue on limitation of time, the applicant's counsel submitted that, this application is not subject to the provisions of section 3 (1) of the Law of Limitation Act Cap 89 R.E 2019 as the same was not brought under provisions of the Civil Procedure Code Cap, Revised Edition, 2019. According to the counsel the time limitation of this application is guided by item 21 part III of the schedule to the Act whose time limitation is sixty days and according to him this application was filed in court within the said period of sixty (60) days and salvaged by section 26 of the Law of Limitation Act (Supra) as the 1st respondent neither served the applicant nor did he pay necessary corporation.

The applicant's counsel also argued that the applicant was not aware of the order and the accounts filed in court therefore the applicant could not have acted on an impossibility. He further argued that, the applicant properly moved the court by citing section 43 of the Administration General (Powers and Functions) Act

Submitting on the last point of the preliminary objection, the applicant's advocate seriously argued that this application is not omnibus for the reason that the application was brought under the same provision of the law, further to that the counsel was of the view that even if the application was omnibus yet it is not prohibited by any, he urged this court to make a reference to the case of **MIC (Tanzania) Ltd vs. Minister of Labour and Youth Development & another**, Civil Appeal No. 103 of 2004 (Unreported-CAT) where it was stated;

"In my opinion the combination of the two applications is not bad in law. I know of no law that forbids such a course. Courts of law abhor multiplicity of proceedings. Courts of law encourages the opposite."

In his rejoinder, the 2nd respondent's counsel, stated that the applicant cannot be salvaged by section 26 of Law of Limitation Act since he could have discovered the alleged fraud within reasonable time and if he would be covered by section 26 of the Act yet his application is time barred as sixty days had elapsed and that if he was able to file an application for stay of execution registered as No. 5 of 2018 (Stay No. 144 of 2018 when an appeal to the Court of Appeal was filed

in the Court of Appeal, according to him, the applicant was therefore fully aware of the order. Regarding the point of functus officio and omnibus application, the counsel reiterated his submission in chief.

Having summarized the parties' written submissions, it is now time for this court to determine the points of preliminary objections raised by the counsel for the 2nd respondent, however after going through the written submission of the 2nd respondent's counsel. I have noted that there are some arguments which need further proof as rightly argued by the applicant's counsel for instance that the applicant filed a notice of appeal to the Court of Appeal or that the applicant has filed an application for stay. A thorough scrutiny of the 2nd respondent's points of preliminary objections as well as the arguments depicted in his written submission trickle that 1st and 2nd limb of objection are one point of law. Hence, the following are the 2nd respondent's points of law for determination;

1. Whether this court is functus officio to determine this application
2. Whether this court has been moved properly to determine the present application.
3. Whether the application is time barred.
4. Whether the applicant's application is bad in law for being an omnibus application.

I shall now start to determining the **1st limb** of objection, whether this court is functus officio to determine this application. I have thought the issue of being

functus officio is equated to lack of jurisdiction to entertain the matter, thus, it is paramount point of objection ought to be determined before determining other points of objection.

It is plainly evident from the court's records that on the 27th June 2016 the 1st respondent was appointed by this court in Civil case No. 09 of 2013 as an administrator of the estate of the Late GURBAX SINGH ARJAN RAM (deceased). It is further undisputed that the 1st respondent exhibited in this court the inventory and accounts on 21/02/2018. On 02/08/2019 the 1st respondent through Misc. Civil application No. 79 of 2019 sought for the orders to be discharged from administering the estate of the deceased. Summons was issued to the interested persons to appear before the court, accordingly, The accounts were examined in the presence of the 2nd respondent and in the applicant's absence and it was indicated that the applicant was out of the country and his date of return is unknown.

Moreover, there was no objection that was raised by an interested party, 2nd respondent who was able to appear. This court, after it had adjourned the matter with a view of requiring appearance of other interested party to appear, granted the sought order by discharging the 1st respondent from administration of the estate of the deceased. Thereafter Civil Case No. 09 of 2013 was finally and formally closed.

However, the learned counsel for the applicant was of the view that, this court is not functus officio since the court has not issued a certificate envisaged under section 43 (2) of the Administrator General Act (supra) and that the court did not examine the inventory and accounts. According to him, there was no effectual discharge of the Administrator General.

Considering the parties' submissions and the nature of the court's order, I am of the view that the issue that the court did not examine the inventory and accounts so filed and that there was no certificate that was issued to effectuate the discharge in favour of the 2nd respondent, in my view, cannot override the order of this court dated 18th October 2019 closing the Civil Case No. 9 of 2013 which means that the 1st respondent has been effectively discharged from administering the estate.

The applicant through his averment under para.11 of the affidavit sworn by his counsel is alleging that the 1st respondent obtained the order due to fraud and that the 1st respondent exhibited to the court inventory and accounts including immovable properties which did not belong to the deceased except to himself. In this kind of allegation, the applicant ought to have looked for any other remedy available such as instituting a civil case or criminal case as the case may be as was rightly held in **Ahmed Mohamed Al Laamar vs. Fatuma Bakari & another**, Civil Appeal No. 71 of 2012 (unreported) where the Court of Appeal held inter alia;

“One, if the respondents genuinely believe that the appellant acted in excess of his mandate or wasted the estate and/or subjected it to damage or occasioned any loss to it through negligence, they are free to sue him.

Two, if they are also convinced that he either fraudulently converted some properties forming part of the estate, and/or that he deliberately exhibited a false inventory or account, they are equally free to institute criminal proceedings against him in accordance with the provisions of the governing laws.”

Given the above facts, it is apparent therefore, the 1st respondent had already been discharged by this court and the Civil Case No.9 of 2013 was formally closed. The applicant’s claim to be lawful owner of the personal properties included as estate of the deceased person, the right course or available remedy is to sue for the recovery of his properties, if so, against persons who are in possession of such properties joining the 2nd respondent.

Considering the 1st respondent’s prayer vide Misc. Civil Application No. 79 of 2019 of being discharged from administering the estate after he had able to exhibit inventory and accounts as correctly admitted by the applicant at para. 12 of his advocate’s affidavit and the court order closing the 1st respondent’s administration of the estate of the applicant’s late father. The 1st respondent’s duty as far as administration of the estate of the deceased is concern is therefore considered to have been completed (See a decision of the Court of Appeal in **Ahmed Mohamed**

Al Laamar v. Fatuma Bakari & another, Civil Appeal No. 71 of 2012 and **Hadija Masudi** (as the legal representative of the late Halima Masudi) **vs. Rashidi Makusudi**, Civil Appeal No. 26 of 1992 where the Court of Appeal of Tanzania (unreported).

However, I entirely agree with the learned counsel for the applicant that a judge is *functus officio* once he has given his original order and that he cannot depart from it in the absence of an application for review as was held in **Laemthong Rice. Co. Ltd v. Principal Secretary Ministry of Finance** (2002) TLR 389 but in view that principle is applicable where a material error is apparent as opposed to the matter at hand. Having explained as herein above, the 1st point of objection is hereby sustained.

Now, coming to the **2nd point** of objection on, whether this court has been properly moved to determine the application at hand. The applicant has moved this court by way of chamber summons supported by an affidavit sworn by his counsel. According to the chamber summons, this application glaringly appears to have been brought under the provision of section 43 of the Administrator General (Powers and Functions) Act (Cap 27 R.E, 2002).

The 2nd respondent counsel has challenged that the said provision is not proper for the purposes of moving this court to determine this application he further argued that the applicant ought to have filed an appeal to the Court of

Appeal of Tanzania or by way of a review under Order XLII of the Civil Procedure Code R.E 2019.

On the other hand, the applicant's counsel has argued that the Act in particular section 43 has expressly provided for powers of the court to review inventory and accounts of the estate, hence there is no need to apply another law. Looking at the parties' contentious arguments, this court finds it pertinent to quote the said provision for ease of construing;

“43. Filing of final account

(1) On the completion of the administration of an estate, the Administrator General shall file in court, the accounts and vouchers relating to the estate, together with an affidavit in verification, and after a notice of fourteen clear days has been given in the prescribed manner by the Administrator-General to all persons interested, who are resident in Mainland Tanzania, setting out the day and the hour to be appointed by the taxing officer for the passing of such accounts, the accounts and vouchers may be examined and taxed by the taxing officer in the presence of any person who may attend upon such notice, and objection may be taken to the account, or to any item or part of it and the taxation may be brought under review by the court in the same manner, as in the case of any proceedings in court.

(2) A certificate under the hand of a taxing officer or of a judge of the court to the effect that the accounts have been examined and

found correct, shall be a valid and effectual discharge in favour of the Administrator-General as against all persons.”

Plainly, the above quoted section entails that once the administrator has completed administration of an estate, he shall file inventory and accounts in a court which granted him letters of administration and there after issue a fourteen days’ notice to all interested persons resident in Mainland Tanzania. On the date fixed by the taxing officer for passing of such accounts, the said accounts may be examined and taxation may be reviewed upon application by interested persons present.

According to the provision of the law quoted above, it is my considered view, it basically applies to interested parties to an estate who became aware of the fourteen days’ notice that was given by the Administrator General after filing of the inventory and accounts who reside in Tanzania Mainland and those notified will have a right to raise objection during examination of inventory and accounts if need arises or and taxing of the accounts by the taxing officer. The applicant herein does not meet the threshold couched under the said provision on the following reason, **firstly**, the records reveals that at the time the notice was issued he was not in Tanzania Mainland and according to the sworn affidavit of the process server the applicant was outside Tanzania, thus at the time application no. 79 of 2019 was determined the applicant was not present, **secondly**, the records

further show that no objection that was raised by the 2nd respondent as an interested person.

This court has ventured into the purposive interpretation of the above provision in fact I am of the firm view that the purpose of the legislature did not extend to allow review of the accounts from any interested party even those who did not appear before the court after the 14 days' notice were issued and equally where the court examined the accounts, closed the probate case and discharge the Administrator General. This point of law is equally sustained.

On the **3rd limb of objection** as to whether the application is time barred, the counsel for the 2nd respondent raised this objection by breaking it into two limbs, **one**, that the application to set aside the discharge order was time barred and **second**, that, the application to set aside final accounts is time barred. According to the counsel the time limitation for filing this application is as per Part III of the Law of Limitation Act Item 3 whose time limitation is thirty (30) days from the date of the decision. In answering this question, the first thing to consider is the law that has been used to bring up this application.

The applicable provision of the law cited in moving this court as appearing in the applicant's chamber summons is section 43 of the Administrator General Act (supra). It is glaringly clear that in the said Act no time limitation has been prescribed in bringing a review, if so, arising from either objection of the inventory

and accounts of an estate or from a court's order discharging the Administrator General from administering a deceased person's assets or both. That, being the legal position, the Law of Limitation Act has to come into play as was rightly submitted by the 2nd respondent's counsel.

However, I am not in agreement with the 2nd respondent's argument that, if the prayer of review is entertainable by this court by the citation of section 43 of the Administrator General Act, the prescribed period for filing the application of this nature is 30 days for an obvious reason that item 21 to the Schedule of the Law of Limitation Act is very clear that, if no period is provided in the Act or other piece of legislation thereto any application shall be filed within sixty (60) days from the date a decree was passed or order was made as correctly submitted by the applicant's counsel.

As precisely argued by the applicant's counsel that, section 3 of the Act should not be read in isolation with other sections of the Act as it is controlled by other provisions of the law since the same is not an independent as was rightly emphasized by this court in **AICC Loishoki Mossoni and 3 others**, Land Case No. 12 of 2015 (unreported).

Since the applicant, through the affidavit of Mr. Alute Mughwai, alleges that he was not aware or blissfully ignorant of the filing of the inventory, accounts and the court order. He thus alleges fraud on concealment on the part of the 1st

respondent for the institution of Misc. Civil Application No. 79 of 2019. It follows that, section 26 of the Act should come into play, section 26 of the Act is on the effect of fraud and mistakes reads and I quote;

26. Where in the case of any proceeding for which a period of limitation is prescribed-

(a) the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims;

(b) the right of action is concealed by the fraud of any such person as aforesaid; or

(c) the proceeding is for relief from the consequences of a mistake.

The period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could, with reasonable diligence, have discovered

As per the applicant's affidavit and written submission, I am certainly asked to consider that the inventory and final accounts and in the said application in which the order was made were nothing but a fraud. I have found myself bound to consider section 26 of the Act as argued by Mr. Mughwai and impliedly conceded by Mr. Chadha who persistently stated that the applicant filed his application after lapse of sixty day which denotes that the time from when the order was made to when the applicant became aware is to be excluded. I wholly agree that legal position yet it is still doubtful if the application at hand is not time barred taking

into account that the applicant filed this application on the 14th July 2020 while he became aware of the order on the 15th May 2020.

Therefore, in my view time started to reckon since 15th May 2020 to 14th July 2020 when he became aware of the application and its order, in my simple calculations, there are 17 days in May, 30 days in June and 14 days, thus the applicant filed this application out of the prescribed period of sixty (60) days from the date he became aware of the filing of accounts, inventory and the court order. This application was therefore time barred for one day which required the applicant to apply for extension. The third limb of the application also succeeds.


I shall now turn to the last issue as to whether the application is bad in law due to its being omnibus. The 2nd respondent's counsel argued that the applicant's application is omnibus as the applicant has lumped three different applications in one application. The applicant on the other hand argued that the application is not omnibus because it was brought under one enabling provision of the law and according to him even if the application is omnibus it is not bad in law, he further cited the case of **MIC Tanzania Ltd vs. Minister of Labour and Youth Development & another**, Civil Appeal No. 103 of 2004 (Unreported). I entirely agree with the learned counsel for the applicant as combining prayers such as extension of time and setting aside dismissal order or ex-parte order or ex-parte judgment or setting aside the order and or quashing and setting aside inventory

as was correctly held by the Court of Appeal in the case of **MIC (Tanzania) Ltd vs. Minister of Labour and Youth Development & another**, Civil Appeal No. 103 of 2004 (Unreported)


However, I am also aware of the decision of the Court of Appeal in the case **C. L. Rutagatina vs. The Advocates Committee & another**, Civil Application No. 98 of 2010 (CAT-DSM) (Unreported) which has discouraged the combination of applications or reliefs which joins two or more distinct applications governed by different provisions of the law, where their determination requires different yardsticks and different jurisdictions but in our instant application the applicant's prayers are of the same nature and are referred to under the same law. Thus, this 4th limb of objection is overruled.

From the foregoing discussions, the 1st, 2nd and 3rd point of objection are sustained whereas the 4th point of law is overruled. Consequently, the application is hereby struck out. Considering the fact that the applicant and 2nd respondent are siblings, I therefore make no order as to costs.

It is so ordered.


M. R. GWAE
JUDGE
26/02/2021

Court: Right of appeal fully explained


M. R. GWAE
JUDGE
26/02/2021

