

**THE UNITED REPUBLIC OF TANZANIA  
IN THE HIGH COURT OF TANZANIA  
MBEYA DISTRICT REGISTRY  
AT MBEYA**

**PROBATE APPEAL NO. 10 OF 2020**

(From the District Court of Rungwe District at Tukuyu, in Civil Revision No. 6 of 2019, Originated in the Primary Court of Rungwe District, at Kiwira in Probate and Administration Cause No. 12 of 2019).

**ESSAU ASJILE MAKOSI..... APPELLANT**

**VERSUS**

**OTMAN REBMAN KYAPOKWA..... RESPONDENT**

**JUDGMENT**

*Date of last order: 04.08.2021*

*Date of Ruling: 06.09.2021*

**Ebrahim, J.**

In this appeal, ESSAU ASAJILE MAKOSI (the appellant) was aggrieved by the decision of the District Court of Rungwe District in Civil Revision No. 6 of 2019. The matter originated in the Primary Court of Rungwe District, at Kiwira in Probate and Administration Cause No. 12 of 2019 in which the appellant was appointed as an administrator of the estate of the late Rebman Kyapokwa. His

appointment was challenged by the respondent before the District Court by way of revision on the ground that the application for letters of administration was time barred since it was filed in the Primary Court after a lapse of 16 years without any explanation for such delay.

Upon hearing the parties, the District Court granted the application, quashed and set aside the decision of the Primary Court. It also ordered for maintenance of status quo of the deceased's estate as they were before the appointment of the administrator. The appellant was dissatisfied, hence this appeal.

The appellant came up with two grounds of appeal. The first ground is that the District Court wrongly annulled the decision of the Primary Court on the ground that the application for administration of estate was done out of time. The second ground is that the District Court failed to consider the fact that the respondent benefits himself from the deceased's properties without considering his fellow family members. Owing to these grounds of appeal he prayed for this court to allow the appeal, and quash the decision of the District Court with costs. The respondent objected the appeal.

In hearing of the appeal, the appellant appeared in person, unrepresented, whereas the respondent was advocated for by Mr. Ignas Ngumbi, learned counsel.

In his oral submission, the appellant prayed for the court to adopt his grounds of appeal and simply contended that the District Court's decision confirmed the respondent to own the deceased's properties.

On his part, counsel for the respondent argued that the District Court was proper when it nullified the Primary Court decision since it was time barred. He also argued that the applicant did not give reasons for his delay when he made the application. He further contended that probate matters are to be filled within three (3) years. The time limit was set by this court in the case of **Ramadhani Saidi Abasi Kambuga & Others vs Mbaraka Abasi Kambuga, Probate and Administration Appeal No. 1 of 2015 HCT, at Sumbawanga** (unreported)

As for the second ground of appeal, counsel for the respondent argued that since the issue of owning properties by the respondent was not determined by the District Court, this court

cannot deal with it at this stage. He thus prayed for this court to dismiss the appeal with costs.

Starting with the first ground of appeal the issue is whether the District Court was proper when it nullified the decision of the Primary Court on the ground of time limitation.

It should be noted here that, as correctly argued by the respondent's counsel, the District Court relied on the decision of this court in its decision i.e the **Kambuga Case** (supra). This is because, under the English common law doctrine of *stare decisis* (doctrine of precedent), which is also applicable in our legal system, decisions made by this court are binding to the courts and tribunals subordinate to it; see the decision by the CAT in **Jumuiya ya Wafanyakazi Tanzania Vs. Kiwanda cha Uchapishaji cha Taifa [1988] TLR 146**. However, a judge of this court is not bound by the decision of another judge of the same court with reasons for the departure.

Again, I am aware of the existence of what I can call "two schools of thought" regarding the issue of time limitation in instituting probate and administration cause at the Primary Courts. One School of thought supports the position given in the **Kambuga**

**Case** (supra) that although no specific period of limitation is laid down, there should be no unwarranted delay in bringing such proceedings and that there shall be a statement explaining the delay supporting a petition if the petition is filed more than three years after the deceased's death. The decisions supporting this position include **Masanja Luponya v Elias Lubinza Mashili, PC. Probate Appeal No. 1 of 2020 HCT at Shinyanga** (unreported) and **In Probate and Administration Cause No.03 of 2019 before the High Court of Tanzania at Musoma District Registry, in the Matter of the Estate of the Late Noela Songo Nyekaji in which Majura Songo Nyekaji** was the petitioner.

The other School of thought maintains that there is no limitation of time since the law does not provide for the same. These include the cases of **Majuto Juma Nshahuzi Vs Issa Juma Nshahuzi, PC Civil Appeal No.9 of 2014 (HC), at Tabora** (unreported), and **Hezron Mwakingwe v. Elly Mwakyoma, Probate Appeal No. 3 of 2020 HCT at Mbeya** (unreported).

In considering the importance of the administration of the estate of the deceased and the requirement to distribute the estate to the lawful heirs; I am of a settled mind that since probate

issues concern the right to inheritance, specifying time limitation would cause injustices to some families. The rationale being that after the death of the deceased, his/her estate must be distributed to the heirs irrespective of the time passed. Of-course with regard to the time limit set on the obligation of the estate that touches the rights of other people as set by law. In the instant case, though it was not discussed by the District Court, the record of the Primary Court's Proceedings shows the deceased died intestate living behind ten heirs. There is also a complaint though narrated in the submissions before the District Court that the respondent owned all properties of the deceased which raised the dispute between the heirs. The dispute was referred to the Police Station where they were advised to follow the law to appoint an administrator so that he (administrator) may distribute the estate. More so, there is no any other reported impediment to the estate that touches rights of other people.

Basing on those facts, I am moved to quote a part of the decision in the case of **Majuto Juma Nshahuzi** (supra) where it was held that:

*" ...there is no specific time limit for petitioning for letters of administration and that it would not be in the interests of justice to have such a provision"*

Not only that, in the case of **Hezron Mwakingwe** (supra) Hon. Mongella, J. had this to say:

*"it is my settled view that there is no specific provision of the law expressly providing for limitation of time in filing applications for letters of administration. In my view, probate matters are peculiar in their nature and thus cannot be subjected to the general limitation under Item 21 para III of the Law of Limitation Act. This is because family members have to finish the mourning and decide on who is to administer the deceased's estate. Sometimes relatives may wish to have time to cool off from the loss of their loved one before embarking on the properties left behind. In my view, **if time limitation is to be entertained under such applications the beneficiaries shall be subjected to unnecessary hardships** by seeking first extension of time. I am thus in line with the decision in **Majuto Juma***

*Nshauz (supra) on the position that there is no limitation of time in filing application for letters of administration in the primary court. This in fact has been the practice in primary courts whereby applications of this nature are admitted regardless of the time limit. Mr. Ngumbi argued that this Court should follow the decision to the effect that applications of such nature are subject to limitation of time because it is the latest. With all due respect, the said decision is from a fellow High Court judge of which I am absolutely not bound to follow no matter how recent the same is."*

Being persuaded by the two decisions above, in relation to the matter at hand, I am of the opinion that the circumstance of this case does not support the finding that the delay of 16 year after the demise of the deceased was unwarranted delay. Moreover, the demand of justice and avoiding the likelihood of future disputes, the administration of estates in this case was inevitable. Hence, the District Court was not proper when it nullified the decision of the Primary Court which appointed the appellant as



the administrator of the estates of the late Rabman Kyapokwa on the ground of time limitation.

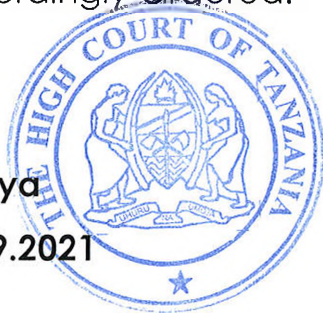
As to the second ground of appeal, I concur with the counsel for the respondent that the same was not decided by the District Court, therefore, cannot be dealt at this stage. In the case of **Hotel Travertine Ltd & Others v. National Bank of Commerce (NBC) Ltd [2006] 133** it was held that, as a matter of general principle, an appellate court cannot allow matters not taken or pleaded in the court below.

Having observed as above, I allow the appeal, quash the decision and set aside the order of the District Court of Rungwe dated at 30/04/2020. Being a probate matter, I make no order as to costs.

Accordingly Ordered.

Mbeya

06.09.2021



A handwritten signature in blue ink, appearing to read "R.A. Ebrahim".

**R.A. Ebrahim**  
Judge

**Date:** 06.09.2021.

**Coram:** P. D. Ntumo – PRM, Ag-DR.

**Appellant:** Present.

**For the Appellant:** Absent.

**Respondent:** Present.

**For the Respondent:** Absent.

**B/C:** Gaudensia.

**Court:** Judgment delivered in open chambers in the presence of the Parties this 6<sup>th</sup> day of September 2021, at 13.00 hours.

  
P.D. Ntumo - PRM

Ag- Deputy Registrar

06/09/2021