

**IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(CORAM: KIMARO, J.A., LUANDA, J.A. And MJASIRI, J.A.)

CIVIL APPEAL NO. 5 OF 2015

SOPHIA MDEE APPELLANT

VERSUS

**1.ANDREW MDEE
2.CAROLYINE MDEE
3.JAMES MDEE
4.NOEL MDEE**

..... RESPONDENTS

**(Appeal from the Judgment and Decree of the High
Court of Tanzania at Arusha)**

(Mwaimu, J.)

dated the 24th day of October, 2014

in

Criminal Appeal No. 4 of 2013

.....

JUDGMENT OF THE COURT

6th & 13th July, 2015

LUANDA, J.A.:

In the Primary Court of Arusha District at Arusha Urban, the appellant SOPHIA MDEE was appointed as administratrix of the deceased estate of Sammy Mdee, her late husband who died intestate. Following that appointment, on 22/8/2007 she was granted letters of administration. It was the expectation of the relatives of the deceased including the above

named respondents that the appellant would collect the properties of the deceased, pay the debts and distribute properties to the deserving heirs. Unfortunately that was not done.

On 16/4/2012 the respondents went to the same Primary Court and lodged a complaint that the appellant had failed to distribute the properties to the deserving heirs and that she was in the process of changing the names of ownership of the houses of the deceased in her name. They asked the Primary Court to revoke the appointment of the appellant as administratrix of the deceased estate. Fortunately, the matter was placed before the same Primary Court Magistrate, with another set of assessors, who appointed and granted letters of administration to the appellant. The court refused to revoke the appointment of the appellant.

Aggrieved, the respondents unsuccessfully appealed to the District Court of Arusha. Still dissatisfied, they appealed to the High Court of Tanzania (Arusha Registry) where the High Court reversed the decisions of the lower courts. It ordered the Primary Court to revoke the appointment and fresh application be filed in the District Court.

The appellant was dissatisfied, she has preferred this appeal in this Court after the High Court had certified that there is a point of law worth to be considered by the Court.

When the appeal came up for hearing, neither the respondents nor their advocate one Mr. Mustapha Akonaay, who was duly served, entered appearance. Following that non appearance of the respondents, Mr. John Materu learned counsel for the appellant prayed that the appeal be heard in the absence of the respondent in terms of Rule 112 (2) of the Court of Appeal Rules, 2009 (the Rules). We granted the application. So, we proceeded with the hearing of the appeal in absence of the respondents. However, before we went into the merits or otherwise of the appeal, the Court in its own motion drew the attention of Mr. Materu as to whether the appeal entertained by the High Court, originating from Primary Court and went to the District Court, which was lodged in the District Court, was filed in time. We raised that question because the appellant somehow had raised it in her written submission appearing on pages 83-84 of the record of appeal which was countered by the respondents on pages 85-86 of the record of appeal shown hereunder which was not considered at all by the High Court.

**IN THE HIGH COURT OF TANZANIA
AT ARUSHA**

PC CIVIL APPEAL NO 9 OF 2013

(Arusha District Court CIVIL APPEAL NO. 15/2012)

(Original from Arusha Urban Primary Court of probate and administration cause No. 167 of 2007)

In matter of administration of the estate of the late SAMMY MDEE of Kijenge – Arusha

1. ANDREW MDEE 2. CAROLIN MDEE 3. JAMES MDEE 4. NOEL MDEE	} APPELLANTS
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Versus

SOPHIA MDEE RESPONDENT

**REPLY TO THE WRITTEN
SUBMISSION**

May it please your Lordship

The respondent in this appeal was the administratrix of the estate of the late SAMMY MDEE who passed away, sometimes in the year 2007 and did leave any will.

Quite happily the Respondent was blessed by the lower court and was directed to follow the probate rules.

Your Honour having said so, it is not safe to revoke the appointment of the administratrix complied the necessary steps to appeal to the high Court.

My Lord, right from starting point the present appeal and the previous are hopelessly time barred why?

This is the answer:-

The Judgment of the Primary Court was delivered on 28/09/2007.

The judgment of District Court was delivered on 21/11/2012.

The judgment of District Court was delivered on 21/11/2012

The previous appeal was filed beyond the statutory period of 30 (thirty) days as per section 20 (3) of the 5th Schedule of the Magistrates Courts Act (Cap 11 RE 2002)

Your Honour having gone through the proceedings it appears that the application for revocation is null and Void.

That the Appellant being related biologically to the respondent the present Appeal is not in the place and it will attract enmity between the parties.

REASON WHEREFORE: The Respondent prays that the appeal is dismissed with costs.

Dated at Arusha this 13th day of August, 2013

.....
RESPONDENT

Presented for filing this 13th day of August, 2013

.....
REGISTRY OFFICER

**IN THE HIGH COURT OF TANZANIA
AT ARUSHA**

CIVIL APPEAL NO 4/2013

(Arusha District Court CIVIL APPEAL NO. 15/2012)

(c/f Arusha District Court. Civil Appeal No. 15 of 2012 originating from Arusha Urban Primary Court, Probate and Administration cause No. 167 of 2007)

1. ANDREW MDEE	} APPELLANTS
2. CAROLIN MDEE		
3. JAMES MDEE		
4. NOEL MDEE		

Versus

SOPHIA MDEE RESPONDENT

REJOINDER TO THE RESPONDENT'S SUBMISSION

May it please your Lordship

This is our rejoinder in response to the reply submission filed by the respondent.

Your honour, we repeat what has been stated in our written submission in relation reasons why the administratrix should be removed, the facts which the respondent has fail to rebut. However, on the allegation that the appeal was filed out of time, we would like to draw an attention to this Honourable Court that the respondent ought to have made an objection before the matter heard. But for the sake of, the following is what is transpired;

1. Our appeal originated from the ruling of the Primary court which was delivered on 30th March 2012. We filed a notice of appeal on 27th April 2012 and our petition of appeal was registered in the District Court on 30th April 2013
2. The judgment was delivered by the District Court on 21st November 2012 and we filled the notice of appeal on 22nd November 2012. We were supplied with a certified copy of the judgment on 19th December, 2012 and we filled the appeal on 10th January 2013.

Your Honour, in sequence of dates explained above, we are in no doubt that our appeal have always be within time required by the law and we repeat our prayer, that this appeal be allowed by revoking the Grant of Administration to Sophia Mdee in her place, **NOEL MDEE** and **ANNA MDEE** be appointed.

We submit,

Akunaay & Co. Advocates

Dated at Arusha this 19th day of August 2013

.....
COUNSEL FOR THE APPELLANTS

PRESENTED for filling this 19th day of August 2013

.....
REGISTRY CLERK

Though the appellant, a lay person, did not raise that issue as a point of preliminary objection, we are of the firm view that so long as the issue of law was raised, which questioned the competency of the appeal, the High Court was duty bound to entertain it by inviting the parties to address the Court as to whether or not the appeal was time barred. A court of law which proceeded with hearing of the case without first entertaining the issue of law, even though not properly raised, which goes to the competency of the case of which the court is called upon to adjudicate is abdicating its duty.

In our case we have seen the appellant had raised the issue of the appeal being time barred and the respondents made a reply maintaining that it was filed in time. We accordingly invited Mr. Materu to address us on that issue basing on the facts found in the record. Mr. Materu was focused and to the point. He told the Court that the decision of the first appellate District Court was delivered on 21/11/2012 whereas the appeal in terms of S. 24 (3) of the Magistrates' Courts Act, Cap.11 R.E. 2002 (the Act) was lodged in the District Court on 10/1/2013. He went on to say

under S.25(1)(b) of the Act if one intends to further appeal to the High Court against a decision of a District Court in matter originating in a Primary Court, he must file his appeal within 30 days after the date of the decision. Attaching a petition of appeal with a copy of judgment is not a legal requirement in matters arising from a Primary Court. Rather it is a legal requirement on matters originating from District Courts and Courts of Resident Magistrate as is provided for under the Civil Procedure Code. It is his submission that the appeal lodged in the High Court was outside the prescribed time of 30 days. He urged the Court to invoke its revisional powers as provided for under S.4(2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002 (the AJA) and quash the entire proceedings of the High Court and set aside all orders made thereof.

The starting point is the procedure as to how and where an appeal is lodged in the High Court on matters originating from Primary Courts. S. 25(3) & (4) which falls under Part III of the Act provide the answers. It reads:-

(3) Every appeal to the High Court shall be by way of petition and shall be filed in the District Court

from the decision or order of which the appeal is brought.

(4) Upon receipt of a petition under this section, the district court shall forthwith dispatch the petition together with the record of the proceedings in the primary court and the district court, to the High court.

From above it is clear that if one intends to appeal in the High Court from the decision or order of the district court in matters originating from primary courts, he has to lodge his petition of appeal in the district court which handed down the decision and the district court shall immediately forward the same to the High Court.

The next question is what is the prescribed time of filing such an appeal? Section 25(1) (b) of the Act clearly provides the time: it is 30 days after the date of the decision of the District Court. However, if one is late to do so or feels that he would not make it, the section also permits the intended appellant to seek leave of the High Court to file the appeal outside the prescribed time of 30 days. The section provides:-

25(1) Save as hereafter provided:-

*(b) in any other proceedings any party, if aggrieved by the decision or order of District Court in the exercise of its appellate or revisional jurisdiction may **within thirty days after the date of the decision or order**, appeal therefrom to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired. [Emphasis Supplied]*

In our case the appeal was filed on the 50th day (21/11/2012 – 10/1/2013) which is beyond 30 days after the date of the decision. It would appear, the respondents were under the impression that a copy of judgment which was supplied to them on 19/12/2012 was a legal requirement in filing an appeal in the High Court on matters originating from primary Courts. We shall see whether a copy of judgment is necessary in filling an appeal in the High Court on matters originating from Primary Courts. This bring us as to what is a petition of appeal and its contents.

Unfortunately, the Act is silent on these two issues. However, the Civil Procedure (Appeals in Proceedings Originating in Primary Courts)

Rules, 1963 (GN. 312/1964) which is the applicable law when hearing appeals originating from Primary Court provide us with the answers. Rule 2 of the said Rules defines what is a petition of appeal. It reads:-

"petition of appeal" includes the record of the grounds of appeal where the same have been stated orally and recorded by the District Court under the provisions of paragraph (b) of the proviso to subsection (3) of section 20 of the Act.

Whereas Rule 4(1) & (2) of the said Rules reads:-

4(1) Every petition of appeal to a District Court from a decision or order of a Primary Court and every petition of appeal to the High Court from a decision or order of a District Court in the exercise of its appellate or revisional jurisdiction shall set out precisely and under distinct heads numbered consecutively the grounds of objection to the decision or order appealed against and shall be signed by the appellant or his agent.

(2) Every petition of appeal to the High Court shall be filed in duplicate.

From the foregoing it is clear that attachment of a copy of judgment along with the petition of appeal is not a legal requirement in instituting appeals originating from Primary Courts.

In **Gregory Raphael v. Pastrory Rwehabula** (2005) TLR 99 (HC) the High Court made the following observation when it discussed Rule 4 of the said Rules, which we entirely agree. The High Court said;-

"As it can be seen, attachment of a certified copy of judgment is not one of the contents of the petition of appeal as it used to be in appeals originating from District Courts and Courts of Resident Magistrate as is provided under 0.39, rule 1 of the Civil Procedure Code, 1966 which law is not applicable in Primary Courts. Failure to attach memorandum of appeal along with a copy of decree and judgment renders the appeal incompetent. Attachment of copies of decree and judgments is a condition precedent in instituting appeals originating from district courts and courts of resident magistrate."

In view of the foregoing therefore, the appeal lodged in the High Court was time barred. We agree with Mr. Materu. In the exercise of our revisional powers as provided for under S. 4 (2) of the AJA the

proceedings of the High Court are quashed and orders made thereof set aside. The decision of the Primary Court which was affirmed by the District Court stands. We award no costs, for obvious reason.

Order accordingly

DATED at ARUSHA this 9th day of July, 2015

N.P. KIMARO
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



E.Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL