IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MWAMBEGELE, J.A., and KEREFU, J.A.)

CIVIL APPEAL NO. 98 OF 2018

SWABAHA MOHAMED SHOSI.....APPELLANT

VERSUS

SABURIA MOHAMED SHOSI .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, at Tanga)

(Khamis, J.)

dated the 27th day of December, 2017
in
Misc. Probate Application No. 11 of 2017

JUDGMENT OF THE COURT

08th & 19th June, 2020

KEREFU, J.A.:

This appeal arises from the ruling and order of the High Court of Tanzania at Tanga in respect of Misc. Probate Application No. 11 of 2017 (Khamis, J.) dated 27th December, 2017. In that application the appellant applied for extension of time within which to file a notice of appeal against the decision of the District Court of Tanga in Probate Appeal No. 2 of 2016 after failure to do so within the prescribed period under the law. Her application was dismissed by the High Court, hence this appeal.

As per the record of the appeal, this matter originates from Urban Primary Court of Tanga in Probate Cause No. 220 of 2015, where the appellant unsuccessfully sought to object the appointment of the respondent as an administratrix of the estate of the late Mohamed Shosi Yusufu who died on 1st October, 2012. Aggrieved, the appellant unsuccessfully preferred an appeal to the District Court of Tanga vide Civil Appeal No. 2 of 2015. Still dissatisfied, but being out of time to appeal, the appellant lodged an application for extension of time in the High Court vide Misc. Civil Application No. 67 of 2016. However, the said application was struck out for being incompetent. Still determined, the appellant lodged another application for extension of time vide Misc. Civil Application No. 11 of 2017. The ground or reasons for seeking extension of time as indicated in the appellant's affidavit in support of the application were mainly two; **one,** the appellant's ill health and **two,** illegalities in the decisions of the trial court and the first appellate court.

However, in its decision the High Court considered only the issue of appellant's ill health and dismissed the application with costs. In the Memorandum of Appeal before us, the appellant has preferred six (6) grounds which raised two main issues; that the High Court erred in law and

fact (i) for failure to consider the ground of illegality submitted before it, and (ii) by holding that the applicant's sickness was insufficient reason for extension of time despite clarification by her doctor in regard to her admission in the hospital.

At the hearing of this appeal, the appellant appeared in person without legal representation while the respondent was represented by Mr. Abdon Rwegasira, learned counsel. Pursuant to Rule 106 (1) and (7) of the Tanzania Court of Appeal Rules, 2009 as amended, both parties had earlier on lodged their respective written submissions and reply written submissions in support of and in opposition to the appeal which they sought to adopt to form part of their oral submissions. We wish to state at this juncture that for reasons that will be apparent in the course of this judgment, we will only summarize the arguments of the parties in respect of the first issue on illegality, which we think is sufficient to dispose of this matter.

Submitting on the issue of illegality, the appellant faulted the learned judge for failure to consider the alleged illegalities submitted before him. She said, before the High Court, among others she clearly indicated that:-

> *(a) The decisions of the trial court and the first appellate court were tainted with illegalities as the*

validity of the family meeting's minutes used to appoint the respondent as an administratrix of the estate of the late Mohamed Shosi Yusufu were questionable for being attended and signed by Mwanafua Mohamed Shosi and Leya Mohamed Shosi who were children of 3 and 8 years old, respectively. That, given their age, the said children were incompetent to attend and sign the alleged minutes as they were not able to understand the meeting proceedings as per section 2 of the Age of Majority Act, Cap. 43 R.E. 2019;

(b) *The Magistrate considered two family meetings' minutes held on 16th December, 2015 and 26th January, 2016, respectively and the latter was held after the grant; and*

(c) *The existence of two conflicting judgements of the trial court granting letters of administration to the respondent by the same Magistrate bearing same date and signature. The two judgements were attached to the applicant's supporting affidavit where one indicated that the deceased parents were dead and the other one indicated that the deceased mother is still alive and there was an intention to deprive her inheritance rights.*

It was the strong argument of the appellant that had the learned judge properly directed his mind and considered the above illegalities, he would not have dismissed the application as the alleged illegalities, if established, were sufficient to move the court to extend time. To buttress her position, she cited the case of **the Principal Secretary Ministry of Defence and National Services v. Devram Valambhia** [1992] TLR 185. Based on her submissions, the appellant urged the Court to allow the appeal, quash and set aside the ruling and order of the High Court with costs.

In response, Mr. Rwegasira, though he conceded that the learned judge did not consider the issue of illegality brought before him, he argued that, whether to grant or refuse the application for extension of time was entirely in the discretion of the learned judge and cannot be interfered by this Court unless it is established that the said judge has misdirected himself and thus arrived at a wrong decision. To support his proposition, the learned counsel made reference to the previous decision of the Court in **Tusekile Duncan v. The Republic,** Criminal Appeal No. 202 of 2009 (unreported).

To justify the decision made by the learned judge, Mr. Rwegasira argued that, the two copies of the said family meetings' minutes alleged to

be invalid were not placed before the High Court to enable the learned judge to consider the alleged illegalities. As for the existence of the two judgments of the trial court, Mr. Rwegasira contended that the appellant did not tell the court the source and authenticity of the second judgement. As such, Mr. Rwegasira argued that, the alleged illegalities were not apparent on the face of record as decided in the **Principal Secretary Ministry of Defence and National Services** (supra), **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 02 of 2010 and **Ngao Godwin Losero v. Julius Mwarabu,** Civil Application No. 10 of 2015 (both unreported).

It was Mr. Rwegasira's further argument that, a ground alleging illegality cannot stand alone to move the court to grant an application for extension of time. According to him, an issue of illegality is supposed to be considered along with other grounds or reasons. Based on his submissions, Mr. Rwegasira urged us to dismiss the appeal with costs for lack of merit.

In rejoinder, the appellant had nothing useful to add except reiterating her previous prayers that the appeal be allowed with costs.

On our part, having examined the record of the appeal and considered the written and oral submissions made by the parties, we are settled that, the issue for our determination is whether it was correct for the learned judge to decline to consider and determine the issue of illegality submitted before him.

Before embarking on the determination of the said issue, we wish to note that, we are in agreement with Mr. Rwegasira on the general principle that an appellate court cannot interfere with the exercise of the discretion of the lower court. However, we had the opportunity of looking into the said general principle, specifically on when and how an appellate court can interfere with such discretion of lower court or tribunal. In **Credo Siwale v. the Republic,** Criminal Appeal No. 417 of 2013 (unreported), relying on the case of **Mbogo and Another v. Shah** [1968] EA 93, the Court stated that:-

> *"(i) if the inferior court misdirected itself; or*
>
> *(ii) it has acted on matters it should not have acted; or*
>
> *(iii) it has failed to take into consideration matters which it should have taken into consideration, and in so doing, arrived at wrong conclusion. Other jurisdictions have put it as 'abuse of discretion' and that an abuse of discretion*

occurs when the decision was not based on fact, logic and reason, but was arbitrary, unreasonable or unconceivable – See PINKSTAFF v. BLACK & DECKTZ (US) Inc, 211 S.W. 361"

In the view of the above stated principle, it is clear that, the said discretion if not exercised judiciously, will be subject to an interference by an appellate court as it was decided in **Tusekile Duncan** (supra) cited to us by Mr. Rwegasira. In that case, the appellant faulted the learned judge for disregarding the reason of illness submitted by the appellant as a good ground for extension of time. The Court, while acknowledging that the learned judge exercised his discretion to refuse the application, it found that the judge was not justified to disregard the said reason. The Court allowed the appeal. Therefore, the Court is entitled to interfere with the exercise of the discretion by the lower courts if there has been a misdirection or abuse of that discretion occasioning a miscarriage of justice. Thus, in determining this appeal, we shall be guided by the above stated principle.

In the appeal at hand, it is clear that before the learned judge there were two main grounds or reasons for extension of time submitted to him for consideration. **One,** that the delay was caused by the appellant's ill

health and **two,** that the decisions of the trial court and the first appellate court are tainted with illegalities. Having carefully perused the appellant's application submitted before the High Court, we have observed that the issue of illegality was extensively covered under paragraphs 6, 7 and 8 of the appellant's affidavit in support of the application. For the sake of clarity, paragraph 7 of the said affidavit indicated that: -

> *"(7) the grounds upon which the applicant intends to rely in her appeal are that: -*
>
> *(a) the honourable court to make finding on the legality or the propriety or otherwise the correctness of the judgment of the District Court that was delivered on 15/09/2016 before Hon. Lyatuu R.M whilst there were two conflicting judgements of the primary court for the same case;*
>
> *(b) the honourable Magistrate erred in law and fact by making a finding that there is no mandatory requirement nor is it an issue for the legal wife of the deceased, his mother and other children to be invited to the family meeting that appointed the respondent as the administratrix of the deceased's estate while not only the law but even common sense and logic dictates;*

(c) *that, the honourable Magistrate erred in law and in fact by making a finding that the participants in the family meeting LEA MOHAMED SHOSI who was 8 years old and MWANAFUA MOHAMED SHOSI who was 3 years old at the time the alleged family meeting was held cannot render the family meeting invalid even if the said names have been signed;*

(d) *the honourable Magistrate erred in law and fact by dismissing the appeal when she, in simple terms ignored the claims by the appellant that the respondent forged a document to Airtel that she had been appointed as administratrix of the deceased estate even before appointed in Probate Cause No. 220 of 2016 which matter was reported to Police file No. DSM/KIN/CID/PE182;*

(e) *the honourable Magistrate erred in law and fact by dismissing the appeal without considering the fact that the respondent had declared that there is a WILL but was not produced and available for inspection before and after the grant of the letters of administration; and*

(f) *the honourable Magistrate erred in law and fact by dismissing the appeal without considering that the family meeting minutes held on 26/01/2016 was convened after the first on was already convened on 16/12/2015 and was*

used to file the Probate Cause and therefore the second meeting was invalid."

There is no dispute that these issues alleging illegalities were not considered and decided upon by the learned judge. We are however mindful that, although, Mr. Rwegasira conceded to that fact, he argued that the learned judge was justified to ignore the said illegalities because they were not apparent on the face of record. He also added that, issues of alleged illegality must be considered along with other grounds, as the same cannot, on their own, move the court to grant extension of time. With respect, we do not agree with the learned counsel.

It is a settled position in our jurisdiction that an alleged illegality, if established, is sufficient to move the court to extend time. This was clearly stated by the Court in the case of **Principal Secretary Ministry of Defence and National Services** (supra) cited to us by both parties, where the Court, while considering a ground of illegality submitted before it, held that: -

"We think that where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is sufficient importance to constitute

sufficient reason within the meaning of rule 8 [now rule 10) of the Rules for extending time. To hold otherwise would amount to permitting a decision, which in law might not exist, to stand."

The Court went on to state that:

"In our view when the point at issue is one alleging illegality of the decision being challenged, the Court has a duty, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right."

Under the guidance of the above settled principle, it is our considered view that, the learned judge erred in dismissing the appellant's application without considering and making a finding on the alleged illegalities which were raised by the appellant.

It is also a settled position of the law that, a matter not decided by the High Court or a subordinate court exercising extended jurisdiction, cannot be decided by this Court. This is the import of section 4 (1) (2) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2019 (the AJA), which we hereby reproduce: -

"4 (1) *The Court of Appeal shall have jurisdiction to hear and determine appeal from the High Court and from subordinate courts with extended jurisdiction; and*

(2) For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the court from which the appeal is brought."

From the above cited provisions, it is clear that the jurisdiction of this Court on appeal is to consider and examine matters that have been considered and decided upon by the High Court and subordinate courts with extended jurisdiction. There is plethora of authorities on this matter, a good example is the case of **Celestine Maagi v. Tanzania Elimu Supplies (TES) and Another**, Civil Revision No. 2 of 2014 (unreported) where this Court stated that:-

"*The powers of the Court on matters arising from the lower courts are only exercisable in two ways. First, by way of appeal. And second by way of revision. This is provided under S. 4 (1) –(3) of the Act.* ***And ordinarily the Court would exercise its appellate***

and revisional powers only after the lower courts have handed down their decisions." [Emphasis added].

Again, in **Alnoor Shariff Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 (unreported) where the trial judge had failed to make a finding on a matter submitted before him, the Court held that:

> ***"Once we have found that the matter that was before the trial judge for consideration was not determined,*** *then it follows that* ***we have no base for continuing to address ourselves with the rest of the grounds,*** *most of which are concerned with the merits of a matter that had not yet been determined by the trial judge." [Emphasis added].*

Likewise, in the appeal at hand, since there is no decision of the High Court on issues alleging illegalities submitted by the appellant before it, we have no basis of continuing to address the rest of the grounds.

In the premises, we are constrained to allow the appeal. Consequently, we quash the ruling and set aside the order of the High Court delivered on 27th December, 2017 in respect of Misc. Probate Application No. 11 of 2017. We order that the record be remitted to the High Court before

the same judge for composition of a fresh decision on all matters submitted before him. Considering that this appeal stems from a family dispute, we make no order as to costs.

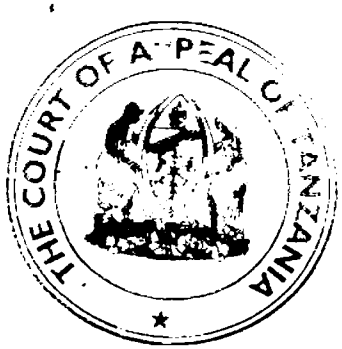
DATED at **DAR ES SALAAM this** 16th day of June, 2020.

A. G. MWARIJA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

R. J. KEREFU
JUSTICE OF APPEAL

The ruling delivered this 19th day of June, 2020 in the Absence of Appellant who reported sick but represented by his brother Seleman Mohamed Matonde and in presence of Mr. Abdon Rwegasira, learned counsel for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
DEPUTY REGISTRAR
COURT OF APPEAL