

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

P.C. CIVIL APPEAL 112 OF 2004

*(From the Decision of the District Court of Ilala Civil Appeal
 No. 17 of 2002 Bakari Kisensi, DM)*

ALLY OMARIAPPELLANT

VERSUS

ABDALLAH MAKOKA.....RESPONDENT

JUDGMENT

A.Shangwa,J.

This appeal is against the ruling of Bakari Kisensi, DM in Civil Appeal No.17 of 2002 filed at the District Court of Ilala. In his ruling, the said Magistrate gave judgment in favour of Abdallah Makoka who was the appellant in that case for failure by Ally Omari who was the respondent in that case to file reply submissions within time as specified by the Court on 31/3/2003. The said ruling was given after counsel for Ally Omari, the late Rweyemamu had made a prayer for

extension of time to file reply submissions which was refused.

Ally Omari was not satisfied with the ruling of the District Court. He engaged the services of his counsel the late Rweyemamu who drew and filed the memorandum of appeal on his behalf. Five grounds of appeal were raised in his memorandum of appeal. Out of the said grounds, it is ground 2 and 3 which are most relevant. Ground No. 2 reads as follows : That, the learned Magistrate was clearly in error by refusing to allow the respondent extension of time to file his written submissions because by such a refusal the Magistrate denied the respondent the basic and fundamental right to be heard. Ground No.3 reads as follows: That, the learned Magistrate misdirected himself by treating the law governing the filing of a written submission as the same as

the law governing the filing of replies to written statement of defence.

The record of the District Court of Ilala in Civil Appeal No.17 of 2002 shows that on 31/3/2003, Bakari Kisensi, D.M. ordered that the appeal be argued by way of written submissions. Mrs. Washokera, Advocate for the appellant now respondent had to file her written submissions by 30/6/2003 and the late Mr.Rweyemamu for the respondent now appellant had to file his written submissions by 14/7/2003. The late Rweyemamu failed to file the same by 14/7/2003 as ordered by the Court.

On 5/8/2003, the late Rweyemamu prayed for extension of time to file his written submissions. He told the Court that he failed to file his written submissions within time as fixed by the Court because he was very sick. He was

feeling pain in his legs especially the left leg. Abdallah Makoka who was the appellant before the District Court objected to his prayer. His objection was upheld and judgment was entered in his favour.

In his ruling, Bakari Kisensi, DM held that as Ally Omari failed to file his reply submissions within the prescribed time, judgment has to be entered in favour of Abdallah Makoka. He based his decision under O.VIII, rr (1) (2) and 14(1) (2) of the Civil Procedure Code, 1966.

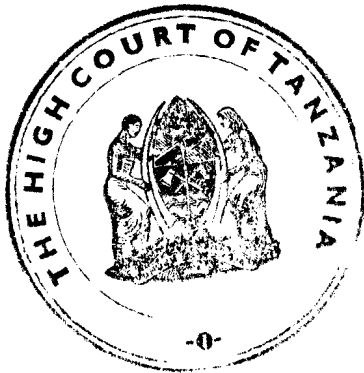
In my opinion, the learned District Magistrate erred in refusing to give the respondent now the appellant extension of time to file his written submissions as there was reasonable cause for not filing them within the time limit specified by the Court. The cause for the delay was due to

his counsel's sickness the late Rweyemamu whose legs had been affected by disease.

Also, the learned District Magistrate erred by invoking the provisions of O.VIII. rr (1) (2) and 14 (1) (2) of the Civil Procedure Code in entering judgment in favour of the appellant notably because those provisions do apply in original cases where the defendant has failed to present his written statement of defence or where the plaintiff fails to file his written statement of defence to the counter claim within the time fixed by the court, but not in appeal cases where the respondent has failed to file his reply written submissions within the time fixed by the Court.

For these reasons, I quash the District Court's ruling and I allow this appeal. I order that the appellant should be given extension of time within which to file his written

submissions so that the appeal may be heard and determined on merit. As none of the parties can be blamed for the District Court's errors, I make no order as to costs.



A. Shangwa, J.
A. Shangwa, J.

24/5/2006.

Delivered in open Court this 24th day of May, 2006.

A. Shangwa, J.
A. Shangwa, J.

JUDGE

24/5/2006.

IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 203 OF 2004

*(From RM'S Court of Dar es Salaam, Kisutu; Probate and
Administration Cause No.39 of 1997 T.S. Mbilinyi, R.M)*

1. AMANA TAWETE	}	APPELLANTS
2. HALIMA TAWETE.....		
3. AMINA TAWETE		

VERSUS

ALFRED FRANCIS KANDEO.....RESPONDENT

J U D G M E N T

A.Shangwa,J.

There are two appellants in this case namely Amana Tawete and Amina Tawete who are registered as the 1st and 3rd appellants respectively. The 2nd appellant Halima Tawete withdrew from the appeal for lack of interest in it and I marked her to have done so.

Both appellants and the respondent are contesting for ownership of house No.3 at plot No. 48 located at Magomeni

within Dar es Salaam city. The appellants are saying that they inherited it from their late father Alli Nassoro and the respondent is saying that he inherited it from her mother the late Sofia Alli Fusi.

In resolving their dispute, the learned Resident Magistrate, Mr. Mbilinyi who presided over Probate and Administration cause No. 39 of 1997 at the Court of the Resident Magistrate at Kisumu found that the house in issue belonged to the persons who are both deceased namely Alli Nassoro who is the father of the appellants and Sophia Alli Fusi who is the mother of the respondent.

Upon his finding, he held that the offsprings of Alli Nassoro i.e. the appellants are entitled to half share in the Plot/ House in dispute and the offspring's of Sophia Alli Fusi i.e. respondent and (others) are entitled to the remaining half share in it.

The appellants were dissatisfied with the said finding and holding of the lower Court. They have now appealed to this Court. They have raised three grounds of appeal for determination by this Court. Despite the fact that there are three grounds of appeal, the major ground is the first one which reads as follows:

" That the learned Magistrate erred in law and fact in finding that the Plot/house in dispute is owned by two parties thus the house be divided into two equal parts between the offspring of Alli Nassoro and that of Sophia Alli Fusi".

I will consider this ground only which I think is quite sufficient to dispose of this appeal. I will begin to show the facts giving rise to the dispute between the parties. These facts are that: the appellants and the respondent's mother Sophia Alli Fusi who is deceased are sisters. Their father is the late Alli Nassoro. It happened that Sophia Alli Fusi died

in January, 1997 before her father the late Alli Nassoro. She left behind four children including the respondent. Alli Nassoro himself died on 5/4/1998. After his death, the dispute between the parties cropped up.

The respondent and his brother Mussa Francis Kandeo and his two sisters namely Silvia Francis Kandeo and Lusua Francis Kandeo started claiming that the plot/ house in issue belonged to their mother the late Sophia Alli Fusi and that it formed part of her estate. The appellants resisted their claim by saying that it belonged to their father the late Alli Nassoro who was offered the plot in issue and built a house on it a long time ago even before the respondent's mother was born.

On 5/11/2003, the respondent filed a chamber application in the Court of the Resident Magistrate at Kisumu requesting it to order the appellants jointly and severally to

surrender the house in dispute to him on grounds that it forms part of the estate of his mother the late Sophia Alli Fusi.

During the course of hearing that application, the learned Resident Magistrate decided to summon someone from the Ministry of lands in order to find out as to who is the real owner of the Plot on which the house in issue is built.

On 16/4/2004, someone from the said Ministry called Blasias Athanas appeared and told the Resident Magistrate that there are two files in respect of the said plot which are in their custody. One file bears the name of Alli Nassoro and another file bears the name of Sophia Alli Fusi.

The learned Resident Magistrate based his finding and decision which has already been stated on the information

given to him by Blasias Athanas from the Ministry of Lands. The question to be considered is whether the said Magistrate was correct in his finding and decision.

In my considered opinion, his finding that the plot/ house in dispute was owned by two persons namely the late Alli Fusi and Sophia Alli Fusi is totally wrong. The fact that there are two files in the Ministry of Lands in respect of the Plot in issue, one bearing the name of Alli Nassoro and another one bearing the name of Sophia Alli Fusi who are deceased as stated by Blasias Athanas does not automatically lead to the conclusion that the plot/ house in dispute was owned by both of them.

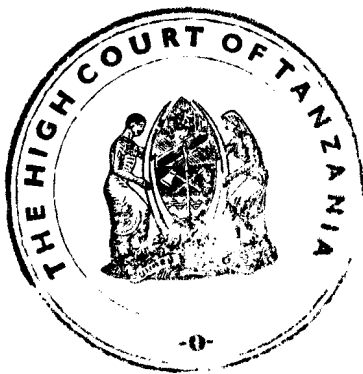
The late Sophia Alli Fusi is the daughter of the late Alli Nassoro. When she was born Alli Nassoro who is her father had already been offered the plot in issue and developed it by building a house thereon. It is in this house that she grew

up with her sisters i.e. the appellants. There is documentary evidence in the lower Court's record headed HATI YA HAKI YA KIWANJA (Right of Occupancy) to show that the late Alli Nassoro was offered the Plot in issue on 5/10/1961.

Blasia Athanas told the lower Court that there is no record in the Ministry of Lands to show that Alli Nassoro did transfer the plot in issue to his daughter Sophia Alli Fusi at any time before her death. It is surprising therefore as to how Sophia Alli Fusi was offered the plot in issue and given a certificate of occupancy for it which is dated 24/4/1978 without having there been such a transfer.

I find therefore that she was offered this plot and given the said certificate secretly and dishonestly without her father's knowledge. As the said certificate was so given to her, I hold that it is invalid.

In fact, I agree with the appellants that the late Alli Nassoro was the sole owner of the plot / house in dispute and that the said house does not form part of the estate of the late Sophia Alli Fusi. This means therefore that the respondent, his brother and two sisters have no claim of right of inheritance to this plot/ house. The appellants who are the surviving daughters of the late Alli Nassoro are the sole heirs to this plot / house. I therefore quash the lower Court's decision and I allow this appeal with costs.



A. Shangwa
A. Shangwa, J.

24/5/2006

Delivered in open Court this 24th day of May, 2006.

A. Shangwa
A. Shangwa,

JUDGE

24/5/2006.