

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

MISCELLANEOUS CIVIL APPLICATION NO. 466 OF 2017

*(From Civil Appeal No. 43 of 2016 of the Resident Magistrate's
Court of Morogoro. Original Probate and Administration Cause
No.140 of 2016)*

JUSTINE BENEDICT KITENGA.....APPLICANT

VERSUS

FRANCISCA KITENGA.....RESPONDENT

R U L I N G

17 May & 22 June, 2018

DYANSOBERA, J.:

The respondent, through the services of Mr. Jackson Liwewa, learned counsel, has raised a preliminary objection against the application filed by the applicant on the following ground:

The application is untenable in law as the matter in issue originated from the Primary Court to the Resident Magistrate's Court in error, an appeal to this court is impossible and wastage of time.

In the application preferred under section 14 (1) of the Law of Limitation Act [Cap.89 R.E.2002] and section 25 (1) (b) of the Magistrates Courts' Act [Cap.11 R.E.2002] the applicant is seeking, *inter alia*, for an extension of time to file his appeal against the decision of Morogoro Resident Magistrate's Court dated 5th day of October, 2016 before Hon. A. Mwankejela, RM.

The preliminary objection was argued by way of written submissions. The applicant stood on his own while the respondent was represented by Mr. Jackson Liwewa who also argued in support of the preliminary objection.

Submitting in support of the preliminary objection, Mr. Liwewa told this court that in his preliminary objection raised on 10th day of February, 2018, he has raised an issue that the application is untenable in law because the matter in issue originated in the Primary Court to the Resident Magistrate's Court in error and that an appeal to this court is impossible and a wastage of time. Counsel contended that originally the matter originated from the Morogoro Urban Primary Court in which Probate and Administration Cause No. 140 of 2016 was instituted and Fransisca Kitenga was appointed administratrix of the estate of the late Benedict Kulikila Kitenga. The applicant was aggrieved by the trial court's decision appointing the respondent as administratrix of the deceased's estate and appealed to the Resident Magistrate's Court of Morogoro in Civil Appeal No. 43 of 2016 but the appeal was dismissed for lack of jurisdiction. The applicant again appealed to this court vide Civil Appeal No.

99 of 2016 before Hon. Mtungi, J. who struck out the appeal with costs. Now, the applicant is seeking extension of time to challenge the decision of the Resident Magistrate's Court. counsel for the respondent submitted that the present application is untenable because the appeal from the Primary Court was not filed in the District Court as required by section 20 (1) of the Magistrates Courts' Act and rules 3, 4, and 5 of the Civil Procedure (Appeals originating in Primary Courts) Rules, GN No. 312 of 1964 which provides that the appeal from Primary Courts shall lie to the District Court from which the Primary Court is established.

The applicant, on the other hand, argued that the provision cited, that is section 20 (1) of the Magistrates Courts' Act and the rules under GN No. 312 of 1964, simply mean that the Resident Magistrate's Court has no appellate jurisdiction. He submitted that it will be absurd and a bad precedent if the Honourable court takes the suggestion of the counsel for the respondent that the jurisdictional error done by the Resident Magistrate's Court cannot be corrected by this Honourable Court. it was the further argument of the applicant that section 43 (3) of the Magistrates Courts' Act provides that "subject to the provisions of any law for the time being in force, all appeals, references, revisions and similar proceedings of a civil nature in the District court or Resident Magistrate's Court which are authorised by the law shall lie to and be heard by the High Court." it is argued by the applicant that the intended appeal subject to the extension is

tenable and that the preliminary objection should be dismissed.

In rejoining, counsel for the respondent insisted that the case before this court originated from the Primary Court and the proper provisions to be used in such an appeal is section 20 (1) (b) of the Magistrates Courts' Act read together with rules 3, 4 and 5 of the said Rules. As to the provisions of section 43 (3) of the Magistrates Courts' Act cited by the applicant to bolster his argument, learned counsel for the respondent was of the view that the said provisions have been misconstrued and misunderstood in that they deal with proceedings originating in the District Court and Courts of the Resident Magistrate in exercising their original jurisdiction and not appeals from Primary Courts.

Learned advocate for the respondent concluded his rejoinder by submitting that the case has contravened the procedures established by the law that is the case from Primary Court to be appealed to the District Court and then to the High Court, hence the application is untenable in law.

There is no dispute that the jurisdiction, power, of and appeals etc. from Primary courts are governed by Part III of the Magistrates Courts' Act [Cap. 11 R.E.2002], sections 18 to 39 in particular. Section 20(1) (a) and (b) which is under paragraph (b) of Part III of the said Act governs appeals from Primary Courts in the following terms:

(b) Appellate and Revisional Jurisdiction of District Courts (ss 20-24)

20. (1) Save as hereinafter provided–

(a) (.....not relevant)

(b) in any other proceedings, any party, if aggrieved by an order or decision of the primary court, may appeal therefrom to the district court of the district for which the primary court is established.

That this is the legal position, the applicant has conceded to when he submitted that “the provision cited, that is section 20 (1) of the (b) of the Magistrates Courts’ Act and rules 3, 4 and 5 of Civil Procedure (Appeals originating in Primary Courts) Rules, GN No. 312 of 1964

The above provisions are reinforced by the provision of section 25 (3) and (4) of the said Act which provides as hereunder:

25. (1) Save as hereinafter provided–

(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 in respect 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.

For this reason, it is impracticable that even if the application was granted, still the applicant would have unsurmountable task to lodge his appeal to the District Court

in conformity with the above provision where no such appeal was originally lodged there. This is so, because, up to the present, this court has no lower courts records.

On the application of section 43 (3) of the Magistrates Courts' Act, as correctly pointed out by learned advocate for the respondent, such provisions apply to proceedings originating in the District Court and Courts of a Resident Magistrate in exercising of their original jurisdiction and not appellate jurisdiction from primary courts. The said provisions are under Part IV of the Magistrates Courts' Act which is in respect of **"ORIGINAL JURISDICTION AND POWERS OF, AND APPEALS, ETC., FROM DISTRICT COURTS AND COURTS OF A RESIDENT MAGISTRATE (ss 40-46)"**

These provisions are, therefore, not applicable to the present case.

The applicant in his concluding remarks, submitted that it will be absurd and bad precedent if the Honourable court takes the suggestion of counsel for the respondent that the jurisdictional error done by the Resident Magistrate's Court cannot be corrected by this Honourable Court. The answer to this is very simple and is this: this is a court of law. Like all courts, it can do justice only in accordance with the law of the land and not otherwise. The Court of Appeal of Tanzania in the case of **Ahmed Mohamed Al Laamar v. Fatuma Bakari and Asha Bakari**: Civil Appeal No. 71 of 2012 (Tanga Registry-Unreported) had occasion to observe at p. 2 that:

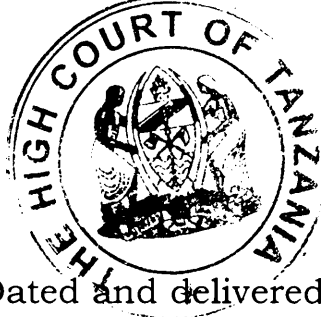
"The conventional wisdom inherent in this observation, was in 2000, given the constitutional

recognition in Article 107B of our 1977 Constitution. We shall, therefore, endeavour to render justice the parties herein are seeking, “in accordance with the law of the land and not otherwise”.

I am bound to follow that guideline.

In the final analysis, the preliminary objection is upheld and the present application is dismissed with costs to the respondent.

Order accordingly.




W.P. Dyansobera

JUDGE

22.6.2018

Dated and delivered at Dar es Salaam this 22nd day of June, 2018 in the presence of the applicant and the respondent.




W.P. Dyansobera

JUDGE