THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

PROBATE APPEAL NO. 1 OF 2019.

(From a Ruling in Probate and Administration Appeal No. 11 of 2018, in the District Court of Mbarali District, at Rujewa, Originating in Probate Cause No. 7 of 2014, in the Primary Court of Mbarali District, at Chimala).

PETRO ROBERT MYAVILWA.....APPELLANT

VERSUS

1. ZERA MYAVILWA.....1ST RESPONDENT
2. ERIKA MYAVILWA.....2ND RESPONDENT

JUDGMENT

26/03 & 04. 05. 2020.

UTAMWA, J:

This appeal has a chequered history, hence lengthy. It is therefore, incumbent, I presume, to narrate its background for purposes of an effective understanding of this judgement. According to the record, the relevant and undisputed facts for purposes of the judgement, which said facts constitute the background of the matter, can be recounted as shown below.

The appellant applied before the Primary Court of Mbarali District, at Chimala (the Primary Court), in Probate Cause No. 7 of 2014, for an appointment as administrator of the estate of the late Robert Myavilwa (the

deceased). However, the Primary Court (before M. J. Moses, Primary Court Magistrate- or PCM), appointed another person, one Abel Mwalibeti the administrator through an order dated 17/11/2014, hereinafter called the first order for ease of reference. Subsequently, on 04/04/2017, another magistrate of the same primary court, Mbillu (PCM) made an order, henceforth the second order in view of differentiating it from the first order. The second order essentially made the following directives: that, the appellant (Petro) was appointed as the second administrator, the first administrator (Abel) had to distribute the estate to the heirs promptly and had to file the inventory on the administration of the estate within three months from the date of that order. Lastly, the order directed that, the second administrator (Petro) could deal with court proceedings only.

The appellant (Petro) was aggrieved by the entire process of the administration that included the making of both orders mentioned above and the way the first administrator (Abel) distributed the estate, especially his act of selling a house. The appellant (Petro) however, found himself time barred for appealing in order to quench his grievances. He thus, lodged an application No. 11 of 2018 before the District Court of Mbarali District, at Rujewa (the District Court) for extension of time to appeal out of time. According to the chamber summons filed before the District Court on 15/08/2018 through Mr. John Owegi, learned counsel, the appellant sought the following two orders only, which I quote verbatim for a readymade reference:

> " **a)**. That, this court be pleased to grant leave to file appeal out of time from Probate Cause No. 7 of 2014 whose decision was delivered on 4/4/2017.

b). Costs to follow the event."

The said application was preferred under section 20 (4) (a) of the Magistrates Courts Act, Cap. 11 [R. E. 2002], herein after called the MCA, and section 14 (1) of the Law of Limitation Act, Cap. 89 [R. E. 2002]. It was accordingly supported by the affidavit of the appellant himself.

Upon hearing both sides, the District Court dismissed the application for want of sufficient reasons vide its ruling dated 09/11/2018 (the impugned ruling). The ruling aggrieved the appellant (Petro). He is now appealing to this court against it. He founded his appeal on the following four grounds through his same learned counsel, Mr. Owegi, which said grounds I also quote verbatim for ease of orientation:

> "**1.** That, the District Court ruling was delivered in ignorance of flagrant substantive errors that occurred during the conduct of the probate case in primary court.
>
> **2.** That, the District Court neither recorded nor considered appellant's arguments that he had a good cause to appeal out of time.
>
> **3.** That, the District Court denied the appellant's prayer for leave to file supplementary affidavit.
>
> **4.** That, the District Court did not consider that the appellant plainly indicated grounds for being disgruntled with the primary court rulings."

Owing to these grounds of appeal, the appellant urged this court to make the following orders: to allow the appeal and set aside the impugned ruling, the appellant be afforded leave to file the appeal (to the District Court) out of time and that, the respondents should be condemned to pay costs before this court and the District Court.

This appeal was argued by way of written submissions. The appellant's written submissions in chief and his rejoinder submissions were drawn, signed and filed by the same Owegi, learned advocate though he did not show up in court at all the material time. The appellant however, opted to proceed without his counsel. The replying submissions by the dual respondents were drawn, signed and filed by Mr. Alfred Chapa, learned advocate who also represented them in this court physically. Upon the due filing of the written submissions the court fixed a date for the judgement on appeal.

When the court posed for composing the judgment on appeal, it noted that, the original record of the primary court was not in the record of appeal. It could not thus, compose the judgment without that record. The record of this appeal indicated that, the said primary court's record had been called by this court when it entertained other various matters instituted by the same appellant in this court and in the District Land and Housing Tribunal, at Mbeya (DLHT). Parties were accordingly informed by this court of the missing record. The judgment on appeal was thus, further adjourned for sometimes pending the efforts of the Deputy Registrar of this court, to retrieval the missing record. The efforts were not fruitful. The court thus, directed a reconstruction of the missing record as the law requires. The Deputy Registrar accordingly reconstructed the record and the court directed the same to be supplied to the parties for their notification before this court could re-fix the date for the judgment on appeal.

Before the court re-fixed the date for the judgment on appeal, the appellant raised a concern in court on the reconstructed record. He showed dissatisfaction with the same on the following grounds: that, pages 4 and 5 of the proceedings before Moses (PCM) were missing from the reconstructed record, the first page of the proceedings before Mbillu (PCM) was not properly readable, but he had the readable page in his own records. He further contended that, the reconstructed record included copies of a valuation report of the house mentioned earlier, his (appellant) medical documents, some receipts issued at police station, the death certificate of the deceased and the will (of the deceased). However all these documents had not been tendered before the primary court. He also prayed to present to the court, the missing pages 4 and 5 of the proceedings before Moses (PCM) and the first page before Mbilu (PCM).

Mr. Chapa, learned counsel for the respondents submitted that, the valuation report and other documents mentioned above by the appellant may not be considered by this court in its judgment on appeal for the reasons adduced by the appellant. He added that, the allegedly missing pages 4 and 5 (of the proceedings before Moses- PCM) are in the reconstructed record supplied to the respondents. As to the missing single page in the proceedings before Mbillu (PCM), Mr. Chapa contended that, no page was missing since the order by Mbillu-PCM was in the proceedings which were the continuation of the previous proceedings dated 30/30/2017.

Upon being examined by the court after he had been supplied with the copies of the missing pages 4 and 5 from this court's copy of the

reconstructed record, the appellant was satisfied with such copies. He also submitted that, he was in court when the first order was made before Moses- PCM and he did not appeal against that decision. He further indicated that, the missing of the first page of the proceedings (before Mbillu-PCM) will not thus, affect the pending judgment on appeal by this court.

The court thus, fixed a date for its decision regarding the arguments made by the parties on the reconstructed record and for the judgment on appeal regarding the main appeal, hence this omnibus judgment.

Owing to the above scenario, I will firstly make a finding on the arguments by the parties related to the reconstructed record. The issue here is *whether or not the weaknesses of the reconstructed record pointed out by the appellant are serious enough to affect its authenticity for purposes of being relied upon in making the judgment on appeal at hand.* In my view, the fact that some documents mentioned above had been included into the reconstructed record though they were not in the original record of the primary court, does not reduce the significance of the reconstructed record. This is because; those documents were not implanted in the reconstructed record just from the air. According to the record of appeal, they came from the appellant himself as annexures in his affidavit supporting the application for extension of time before the District Court. The District Registrar might have thus, inadvertently included those documents in the reconstructed record believing that they were part of the documents in the original record of the primary court.

Moreover, the documents mentioned above are not relevant in deciding this appeal following its nature. The grounds of appeal are in fact, not challenging the merits of any decisions of the primary court, but they are contesting the dismissal of the application for extension of time made by the District Court through the impugned ruling. The said application was, as I intimated before, related to only the second order (dated 04/04/2017) due to the chamber summons before the District Court. It did not concern each and every order of the primary court. The documents at issue were also not relevant to the application before the District Court. They would have been significant to this appeal had the same been against a decision of the District Court on merits of any decision of the primary court, which is not the case now as I observed before. The respondent's counsel is also not contesting the appellant's concern. It is not thus, disputed by the parties that, the documents were not part of the primary court's original record. I therefore, expunge them from the reconstructed record.

As to the missing pages 4 and 5 of the proceedings before Moses-PCM, the same is no longer an issue because the appellant was supplied with them in court and he was satisfied. Regarding the missing first page of the proceedings before Mbillu-PCM, I am of the view that, it is also not a serious aspect since the second order made by Mbillu-PCM, which was the subject matter of the impugned ruling of the District Court, is not disputed by the parties. Besides, the record shows that, it was a continuation of the previous proceedings as rightly argued by the learned counsel for the respondents. Such previous proceedings (dated 30/03/2017) show that, it

was on that date when Mbillu – PCM fixed the date for the second order to be 04/04/2017.

Due to the reasons shown above, and following the undisputed background demonstrated earlier, I hereby answer the issue on the reconstructed record posed above negatively thus: the weaknesses of the reconstructed record pointed out by the appellant are not serious enough to affect its authenticity for purposes of being relied upon in making the judgment on the appeal at hand. The same may now, be safely relied upon by this court for purposes of this judgment on appeal save for the expunged documents.

Having made a finding on the reconstructed record, I now consider the appeal at hand. However, before I consider the grounds of appeal, I must determine another crucial issue. This one is related to the competence of the application for extension of time before the District Court. In the replying oral submissions to the submissions in chief made by the appellant's counsel before the District Court, the respondent's counsel, among other arguments, raised a legal point that amounted in law to a preliminary objection though he did not expressly state so. He argued that, the application before the District Court was improperly filed because it was not accompanied with a copy of a petition of appeal against the decision of the primary court showing the grounds of the intended appeal. He contended further that, this was against the requirement of rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N. No. 312 of 1964 (the GN).

In his rejoinder submissions before the same District Court, the learned counsel for the appellant submitted that, the application was competent since it disclosed the reasons for the intended appeal in the affidavit. That disclosure satisfied the law.

The District Court however, proceeded to decide the application on merits without firstly resolving the arguments by the parties on the legal point, hence its impugned ruling. The learned counsel for the respondents repeated the same arguments before this court in his replying submissions. The same way, in his rejoinder submissions before this court, the appellant's counsel reiterated the same reply to the objection.

In my settled view, it was the duty of the District Court to firstly resolve the arguments on the legal point that essentially challenged the competence of the application before proceeding to the determination on merits. It was irrespective that the objection was raised in the replying submissions. This is because; the same was a legal point which in law, can be raised at any stage of the proceedings by the parties or by the court *suo motu*. Owing to this same position of the law, it was legitimate for the learned counsel for the respondents to re-raise this point again before this court at this appellate stage of the proceedings though the respondents did not cross-appeal against the impugned ruling. This court is therefore, duty bound to resolve this legal point before it proceeds to test the grounds of the appeal as hinted earlier.

The issue here is thus, *whether or not the application before the District Court was incompetent for want of the accompanying petition of*

appeal. In my view, the circumstances of the case do not invite a positive answer to this issue on the reasons shown herein below. In the first place the provisions of rule 3 of the GN read thus, and I paste them here for a quick survey:

> "**3. Applications for leave to appeal out of time**
>
> An application for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal, **and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order**:
>
> Provided that where the application is to a district court, the court may permit the applicant to state his reasons orally and shall record the same." (Bold emphasis is provided).

From these provisions, especially the bold text, it is conspicuous that, apart from other conditions set in these provisions, the applicant in an application of this nature is duty bound to meet either of the following two conditions: he has to accompany a petition of appeal with his written application for extension of time. Alternatively, the applicant has to set out or disclose the reasons for appealing against the decision or order of the primary court subject to the intended appeal.

In the case at hand, the affidavit supporting the appellant's application before the District Court stated under paragraph 7 of the affidavit that, he was not aware of the proceedings that led to the second order, hence he was deprived of the opportunity to defend his interests in presenting the will of the deceased. Again, under paragraph 14 of the same affidavit the appellant deponed that, the proceedings and

judgments/rulings of the primarily court were tainted by substantive and procedural irregularities that led to miscarriage of just and prejudiced him.

In my settled opinion, the contents of paragraphs 7 and 14 shown above amounted, albeit impliedly, to the setting out or disclosure of the reasons for appealing against the decisions or orders of the primary court subject to the intended appeal. The appellant thus, had substantially complied with the requirements of rule 3 of the GN by meeting one of the two options mentioned above. This finding nonetheless, is not tantamount to the holding that, the disclosure of such intended grounds of appeal constituted sufficient grounds for granting the appellant's application. The finding only signifies that, the appellant had followed the required procedure. The issue of whether or not such disclosed grounds of the intended appeal amounted to a sufficient reason for granting the application will be resolved latter in considering the merits of the appeal.

Due to the reasons presented above, I hereby answer the issue posed previously negatively that, the application before the District Court was competent despite lack of the accompanying petition of appeal. The District Court therefore, did not entertain any incompetent application though it ought to have resolved the issue of incompetence before it considered the merits of the same application.

I now revert to the examination of the merits of the appeal through considering the grounds of appeal. It is common ground that, this is a matter on extension of time. It is thus, governed by the rules of extension of time. The law is trite for instance, that, extension of time to perform any

act related to court proceedings must be based on good or sufficient reasons; see the decision by the Court of Appeal of Tanzania (CAT) in the case of **Mumello v. Bank of Tanzania [2006] 1 EA 227** and many others. This is also the spirit underscored under rule 3 of the GN quoted previously.

In his submissions in chief the appellant's counsel grouped his four grounds of appeal into two. He argued the first and fourth grounds together. He also conversed the second and third grounds cumulatively. I will however, for purposes of convenience, firstly consider the second and third grounds of appeal cumulatively and then the first and fourth grounds together.

On the second and third grounds of appeal, the learned counsel for the appellant argued briefly that, the District Court did not grant the appellant's prayer to file a supplementary affidavit that was meant to correct the discrepancy in linking the appellant's averment under paragraph 8 (of the affidavit) with the medical documents annexed to the affidavit. He added that, the medical documents were issued at Mbeya Referral Hospital where the appellant was medically attended. The documents had nothing to do with mental condition which was part of the oral submissions made by the appellant's counsel before the District Court.

In fact, the appellant's counsel was trying to submit that, the District Court erroneously refused his prayer to file the supplementary affidavit that would clarify on the medical documents presented by the appellant before the District Court showing that his illness was among the reasons for the

delay to file the appeal. The counsel's submissions followed the fact that, in the impugned ruling, the District Court took the illness as a mental disorder, but discarded the medical documents as proof of the illness. The District Court based its decision on the oral submissions of the appellant's counsel who in fact, according to the record, argued before it (the District Court) that, the appellant was suffering from mental illness.

In his replying submissions, the learned counsel for the respondents contended that, the appellant's counsel did not make any prayer for filing the supplementary affidavit before the District Court. He (the appellant's counsel) himself made oral submissions before the District Court that the appellant was suffering from mental illness as a ground of delay. The contention was objected by the respondent's counsel on the reason that there was no evidence of the mental illness.

Indeed, the impugned ruling dismissed the appellant's application for extension of time basically on the ground that, he had failed to prove that he had suffered mental illness that had obstructed him from appealing timely. The issues to be determined regarding the second and third grounds of appeal are therefore two as follows:

i. Regarding the second ground of appeal, the issue *is whether or not the District Court failed to record and consider the appellant's arguments on showing good cause for delaying to appeal.*
ii. As to the third ground of appeal, *the issue is whether or not the District Court denied the appellant's prayer for leave to file supplementary affidavit, and if so whether or not it rightly did so.*

For convenience purposes, I will tests the issue related to the third ground of appeal before I examine the one on the second ground.

The answer on the issue regarding the third ground of appeal lies on the proceedings of the District Court. My perusal to such proceedings showed that, neither the appellant nor his counsel made the prayer for filing a supplementary affidavit before the District Court as rightly argued by the respondents' counsel. If anything, the proceedings indicate that, the appellant's counsel submitted before the District Court that, he had an intention to apply for amending the chamber summons, yet he prayed to proceed with the hearing of the application. He was thus, accordingly heard through oral submissions (see page 3 of the typed proceedings of the District Court). Certainly, this court is entitled to trust that record of the District Court. This is because; the law is trite that, court records are presumed to be serious and genuine documents that cannot be easily impeached unless there is evidence to the contrary; see **Halfani Sudi v. Abieza Chichili, [1998] TLR. 527**. I don't see any evidence in the matter at hand capable of impeaching the court record under consideration. It cannot thus, be said that the appellant had prayed to file a supplementary affidavit and his prayer was rejected. I therefore, answer the issue on the third ground of appeal negatively that, the District Court did not deny the appellant's prayer for leave to file a supplementary affidavit. The third ground of appeal is therefore, dismissed.

Regarding the issue on the second ground of appeal, the following three sub-issues are to be determined:

A. *Whether or not the District Court failed to record the appellant's arguments on showing good cause for the delay in appealing.*

B. *Whether or not the District Court failed to consider the appellant's arguments on good cause for the delay in appealing.*

C. *Whether or not the appellant actually, adduced good cause or sufficient reasons for delaying to appeal to the District Court against the second order of the primary court.*

Regarding the sub-issue **"A,"** I am convinced that, the submissions by the appellant's counsel did not explain as to which arguments of the appellant were not recorded by the District Court. On the contrary, the records of District Court conspicuously show that, the submissions by the appellant's counsel were accordingly recorded (see pages 3 to 4 of the typed proceedings of the District Court). This court therefore, trusts these records and believes them since the law guides that they cannot be easily impeached as I underscored previously; see the **Halfani case** (supra). The sub-issue "A" is therefore, answered negatively that, the District Court did not fail to record any of the appellant's arguments on showing good cause for the delay in appealing timely.

On the sub-issue **"B,"** it is clear in the impugned ruling that, the District Court narrated both the appellant's and respondents' affidavital evidence and arguments (see page 15-22). The appellant's affidavit and arguments were indeed to the effect that, the appellant had failed to appeal promptly due to the fact that he was not in court when the second order was made, he then contracted mental illness. This is in accordance with pages 3 - 4 of the typed proceedings of the District Court and

paragraphs 7 and 8 of the affidavit supporting the application. Again, upon narrating the stories of both sides, the District Court framed the issue of whether or not there was sufficient reason for the delay to file the appeal in time (see page 19 of the impugned ruling). It is further clear that, upon framing the issue, the District Court evaluated the affidavital evidence of both parties and their respective arguments (at page 20-22 of the impugned ruling). In so doing, it considered the cases of both sides before making its final verdict dismissing the application with costs.

On the other hand, the District Court did not in fact, consider the appellant's concern on the point of illegality of the primary court's second order raised in his affidavit. I will however, discuss this point on illegality later in examining the first and fourth grounds of appeal.

Moreover, I noted that, in evaluating the evidence and arguments by both sides, the District Court, at pages 20 and 21 of the impugned judgment recorded that the decision of the primary court at issue was that dated 31/03/2017. However, I take this slip as a mere inadvertence that does not amount to the failure by the District Court to consider the appellant's arguments. This view is based on the fact that, in other parts of the impugned ruling the District Court correctly indicated that the decision at issue before it was in fact, the second order (dated 4/4/2017). Besides, there was no any decision of the primary court under discussion before the District Court that was dated 31/03/2017. Again, when the parties were prompted by this court, they also informed this court that, they were not aware of any decision of the primary court dated that 31/03/2017. Indeed, the learned counsel for the respondents rightly clarified before this court

that, the date (31/03/2017) was related to the medical documents which had been attached to the appellant's affidavit and discussed in oral submissions his counsel trying to prove his mental illness. In my view therefore, this kind of minor discrepancies in judgments of subordinate courts are negligible by virtue of section 37 (2) of the MCA. These provisions of the law basically save decisions of subordinate courts with minor errors.

It is further notable under paragraph 15 of the affidavit that, the appellant stated that, his previous Application No. 4 of 2018 for the same extension of time to appeal out of time had been struck out due to misjoinder of parties. This reason was not also considered by the District Court in its impugned ruling. In my view, this particular omission is not blemishing to it. This is because; even the learned counsel for the appellant did not address the District Court on this particular point in his submissions before it. He did not also do so before this court. Besides, the appellant did not indicate in his affidavit as to when such previous application was filed and struck out. Had he mentioned the dates, this court would have considered that contention to see if he had acted promptly, as a diligent party, in filing the application at issue before the District Court upon the said previous application being struck out. Once again, the District Court cannot thus, be blamed for not considering this particular aspect of the appellant's affidavit.

Yet again, under paragraphs 16 and 17 of the affidavit the appellant averred that, he would suffer an irreparable loss if the application was not granted by the District Court. On the other hand, he deponed that, the

respondents would suffer no loss in case the application was granted. The District Court did not also consider this reason. However, in his oral submissions before the District Court the appellant's counsel did not address this point for purposes of clarification. This was also not one of the complaints by the appellant's counsel before this court. He did not also elaborate as to how the appellant could suffer the said irreparable loss.

Additionally, I do not see as to how the appellant could suffer the said irreparable loss for the dismissal of the application by the District Court. This is because; the second order which was at issue before the District Court did not determine any one's substantial right. It essentially directed that the estate of the deceased be distributed to the heirs as hinted earlier. Again, the nature of the proceedings that resulted to the second order were only that, the respondents had complained that the administrator (Abel) had not distributed the estate. In fact, the major complaint by the appellant according to the affidavit, the submissions by his counsel before the District Court and this court is that, the first administrator had erroneously sold the house. However, the remedy for the alleged erroneous sale is before the same primary court. It was not obtainable by appealing against the second order since the said erroneous sale was not at all, a decision of any court, let alone of the primary court under discussion.

Again, the proceedings that led to the second order were not for determining the manner of distributing the estate. In fact, the first administrator had the duty of distributing the estate even without that said second order. That duty was due to the fact that, he had already been

appointed as administrator in the first order of the primary court. I therefore, find that, the District Court cannot be blamed for not considering this particular averment of the appellant that he would suffer irreparable loss for the dismissal of his application.

Having observed as above, the answer to the sub-issue **"B"** is partially negative and partly positive to the effect that, the District Court did in fact, substantially consider the appellant's arguments and did not consider only some of them. However, that omission was not fatal to the impugned ruling for the reasons shown above.

I now consider the sub-issue **"C"** posed herein above. In my view, the circumstances of the case are not in favour of answering the sub-issue affirmatively owing to the following reasons: In the first place, it must be born in mind that, apart from the appellant's reasons that were not considered by the District Court (and which I discussed and discarded herein above), the appellant's major reasons for the delay to appeal against the second order to the District Court as observed before, were basically the following three: Firstly that, he was not in court when the second order was delivered and thus, he could not obtain the copy of the record related to the second order timely. Secondly, he contracted mental illness and thirdly, there was an illegality in the second order. As hinted previously, I will consider the point of illegality later in testing the first and fourth grounds of appeal. I will now examine those other two major grounds here.

Regarding the appellant's reason that he delayed to get the copy of the record related to the second order, the District Court did not accept it. It found that, since it was not a legal requirement to attach the copy of the second order with the petition of appeal to the District Court, the contention was not helpful to the appellant. On my part, I slightly differ with the District Court regarding this particular position. Though it is true that the law did not require the appellant to attach that copy of the second order with the petition of appeal to the District Court, it could well be necessary for him to get its copy for purposes of lodging a sound appeal. However, I am of the view that, the appellant could not rely upon the alleged delay to obtain the copy of the second order as a reason for delaying to appeal on the following reasons: firstly, the law guides that, diligence of a party in pursuing his/her matter is among the factors that constitute a sufficient reason/s for granting extension of time; see the decision by the CAT in **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010** (unreported). The law further guides that, an applicant must account for each day of the delay as rightly contended by the counsel for the respondents who supported this legal stance by citing the case of **Famari Investment (T) LTD v. Dr. Antony Nsojo and another, Civil Application No. 598 of 2018, CAT, at Dar es Salaam** (unreported).

However, in the case at hand, I do not think if the appellant was diligent enough and accounted for each date of delay in seeking and obtaining the copy of the second order against which he intended to

appeal to the District Court. The second order of the primary court was undisputedly made on the 04/04/2017. The appellant filed the application for extension of time before the District Court on 15/08/2018. This was therefore, when a period of more than a year and four months had elapsed. The law requires an appeal of that nature to be filed within 30 days from the date of the decision to be appealed against; see section 20 (3) of the MCA. The appellant however, left a heap of material facts undisclosed, which said material facts would convince the District Court and this court that, he had been diligent in pursuing his right and he had accounted for each day of the belatedness in obtaining the copy of the second order. The appellant for example; did not state in his affidavit and in the submissions by his counsel before the District Court as to when he became aware of the second order which he claimed was made in his absence. He did not also state as to how he knew about that second order.

Furthermore, the appellant stated under paragraph 13 of his affidavit that, on 20/3/2018 when his health improved significantly he instructed his counsel (Mr. Owegi) to act on this matter. The counsel requested for the record of the matter, but he was informed that the record had been dispatched to this court for other proceedings. The counsel then successfully obtained the record from this court. Nevertheless, the appellant was silent as to when and how his counsel applied for the record from the primary court and from this court. It does not also disclose the name or even the rank of the officer of the primary court who had informed the counsel that the record had been dispatched to this court. Moreover, the appellant did not disclose the date when his counsel

obtained the said record, especially the second order. Besides, his counsel did not swear any affidavit to support the contention that he had actually, applied for the record and had obtained it belatedly.

It is also deponed under paragraph 10 of the affidavit that, on 20/07/2017 the appellant filed Land Case No. 14 of 2017 and Misc. Land Application No. 66 of 2017 in this court. The two matters related to the same house that had been sold by the first administrator (Abel). It is also stated under paragraph 11 that, the appellant sought legal assistant from his counsel (Mr. Owegi) who on 15/11/2017 filed two applications, including No. 211 of 2017 before the DLHT.

The surprising side of the appellant's story is that, though he was able to instruct and consult his lawyer on 20/07/2017 and before 15/11/2017 respectively to deal with other proceedings, he did not give reasons why he didn't also instruct him to seek for the copy of the second order of the primary court for purposes of appealing against it on those dates. In other words, the appellant did not make it open as to why was it necessary for him to wait until on 20/3/2018 when he instructed the counsel to act on the matter under consideration. By simple arithmetic, the appellant took more than four months to take action against the second order. This period is computed from 15/11/2017 (when the appellant sought legal assistance from the counsel to act on matters before the DLHT) to 20/03/2018 (when he instructed the counsel to act against the second order which is at issue now).

Due to the reasons shown above, it cannot be said that the appellant was in fact, diligent in seeking and obtaining the copy of the second order. It cannot also be judged that he had accounted for each day of his delay in doing so. Ultimately, it cannot be said that he was diligent and he accounted for each day of delay in appealing to the District Court against the second order.

On the appellant's contention that he contracted mental disorder, the District Court found *inter alia*, that, there was no proof for the said illness. It based the finding on the grounds that, the appellant was able to file other proceedings before the DLHT and before this court at the same period of the alleged mental illness. It also discarded the authenticity of the medical record. In my view, the District Court was justified in finding so. This follows the fact that, though the appellant deponed under paragraph 8 of the affidavit supporting the application that he contracted the perpetual mental illness, he did not state anywhere as to when the said illness started. Furthermore, he stated under the same paragraph that, the illness was on and off. In fact, this particular averment is contradictory to the above explanation that the illness was perpetual, which essentially meant that it was continuous. If at all the illness was on and off, it was also the duty of the appellant to disclose the dates when the illness was on and those days when it was off, but he did not discharge that duty anywhere.

The appellant also attached to the affidavit copies of medical records showing that he was attended in hospital from 31/03/2017 to 10/07/2018. Actually, even if this is taken to be the period for which the illness persisted, this court cannot ~~not~~ believe that the illness was the cause of the

delay to appeal against the second order. This view is based on the following facts; as rightly found by the District Court, the appellant was able to instruct his counsel to file other proceedings mentioned above on 20/07/2017 and 15/11/2017 before this court and the DLHT correspondingly. These dates were, in fact, within the period of the alleged sickness of the appellant (i. e, from 31/03/2017 to 10/07/2018). Actually, it is inconceivable that a person with serious mental illness could be able to consult and engage a lawyer to represent him in judicial proceedings. The appellant, according to the affidavit, only instructed the said counsel to deal with the matter at issue four months thereafter (i. e. on 20/3/2018) as observed earlier. The implication here is that, the purported illness was not the actual cause for the appellant's delay to appeal against the second order. The District Court thus, rightly discarded the illness as a ground of delay in lodging the intended appeal.

Having observed as above, I find that, the appellant was only negligent in pursuing his right (if any) related to the second order. I therefore, answer the sub-issue **"C"** negatively that, the appellant did not adduced any good cause or sufficient reason for delaying to appeal to the District Court against the second order of the primary court.

Owing to the above reasons, I answer the issue regarding the second appeal negatively that, the District Court did not fail to record and consider the appellant's arguments on showing good cause for delaying to appeal out of time. The second ground of appeal is thus, also dismissed.

I now consider the first and fourth grounds of appeal. Regarding these grounds the appellant's counsel essentially argued and meant that, there were illegalities in the decisions of the primary court (including the second order). He added that, a point of illegality in an impugned decision constitutes a sufficient reason for extending time. He supported this legal position by citing the cases of **Omar Shaban Nyambu v. Dodoma Water Sewage Authority, Civil Application No. 146 of 2016, CAT, at Dar es Salaam** (unreported) and **The Attorney General v. Tanzania Ports Authority and another, Civil Application No. 87 of 2016, CAT. At Dar es Salaam** (unreported). He thus, contended that, the District Court erred in not considering the illegalities as sufficient reasons for extending the time. He listed the incidences of the said illegalities. In doing so, he complained against the first order (dated 17/11/2017) and the anomalies in the manner the first Administrator (Abel) distributed the estate. Regarding the second order (dated 04/04/2017), the appellant's counsel only contended that, the proceedings that led to that order were conducted in the absence of the appellant. The appellant was thus, deprived of his right to be heard. The record did not show the name of court and were disjointed and mixed up. The second order was also delivered in the absence of the appellant.

The respondents' counsel basically argued in reply that, there was no any illegality in the second order of the primary court. The appellant was in court when the proceedings that led to the second order were conducted (i. e. on 30/03/2017). The point of illegality was also not raised before the District Court. He further distinguished the precedents cited by the

appellant's counsel on the ground that, no illegality existed in the primary court's decision.

In his rejoinder submissions, the appellant's counsel fundamentally reiterated what was stated in his submissions in chief. He also contended that, the point of illegality was also raised before the District Court. He also made some other arguments on the records which have been discussed and resolved above when I was considering the issue related to the reconstructed record.

Certainly, the impugned ruling by the District Court did not address itself to the point of illegalities though the parties had conversed it in their respective submissions before the District Court. The issue here is thus, *whether or not there was any illegality in the decision of the primary court at issue that constituted a sufficient reason for the District Court to grant the application for extension of time*. In the first place, it must be clearly noted here that, as hinted earlier, according to the chamber summons before the District Court, what was the subject of the intended appeal and the application before it (the District Court) was only the second order (dated 04/04/2017) and not anything else. Nevertheless, in discussing the said irregularities, apart from matters related to the second order which is at issue, both sides also addressed themselves to matters related to the first order and the manner in which the first administrator distributed the estate. In my view, this was not proper. It is because, as I observed before, the subject of the application before the District Court was only the second order (dated 04/04/2017) and not more. This court, as an appellate court, cannot thus, decide on matters which were not subject to the

application before the District Court. In this appeal, I will therefore, consider only the parties' arguments related to the second order.

My settled view are that, the arguments by the appellant's counsel are not conducive on the following reasons: the reconstructed record of the primary court shows that, though the appellant was not in court on the 29/03/2017 (before Mbillu-PCM) when the proceedings which resulted to the second order commenced), he was in court on the subsequently day (on 30/03/2017) before the same magistrate. He even addressed the court on that date. The court on that 30/03/2017, fixed the date for a decision on 04/04/2017. Then followed the second order dated 04/04/2017. Though the reconstructed record does not show the parties who were in court when the order was made, it is not disputed by the parties themselves, as indicated earlier, that the said order was actually, made by the primary court on the said 04/04/2017, hence the grievances by the appellant. It is not thus, conceivable as to why the appellant did not attend to court on that date (04/04/2017) while he was in court during the conduct of the previous proceedings dated 30/03/2017 and he knew the fixed date for the second order.

The appellant's counsel also tried to challenge the authenticity of the primary court's proceedings which show that he was in court on the 30/03/2017. However, he did not give sufficient explanation as to why this court should disbelieve such proceedings. In fact, the same copies of the proceedings were attached to the appellant's affidavit supporting the application before the District Court. This particular challenge against the reconstructed record is thus, an afterthought and unfounded. It is also the

law as underscored earlier that, court records cannot be easily impeached; see the **Halfani Case** (supra).

Furthermore, the appellant did not demonstrate before the District Court and before this court as to how the alleged illegality in making the second order in his absence affected his rights. He strived to demonstrate the effect of the alleged irregularities under paragraph 7 of the affidavit supporting the application before the District Court. He deponed that, the making of the second order in his absence deprived him of the opportunity to defend his interests by filing the will of the deceased that bequeathed part of the estate to him (appellant). Furthermore, under paragraph 14 of the same affidavit, the appellant averred as hinted previously that, the proceedings and the judgments/rulings of the probate case were tainted with substantive and procedural irregularities that led to miscarriage of just to him. He did not however, specify the judgments or rulings envisaged under this paragraph 14. The same is thus, pregnant of speculation since it is not clear if the second order, being the subject matter of the application before the District Court, was among such judgments/rulings.

Moreover, the appellant did not show in the affidavit and in his counsel's oral submissions at the hearing of the application before the District Court as to how the directives made in the second order (as listed above) affected his right to present the will. In fact, the proper forum for presenting the will would have been in the proceedings that resulted to the first order in which he (appellant) was the applicant for the letter of administration as hinted earlier. The proceeding that resulted to the second order were only instituted by the respondents following their complaint that

the first administrator (Abel) had not distributed the estate. These proceedings thus, were not the only fit opportunity for the appellant to present the will. Besides, that forum did not at all discuss the issue of "which properties constituted the estate," which said issue would make it necessary for the appellant to present the will.

It is also notable from the record, as rightly contended by the respondents' counsel that, the appellant's major complaint in this matter is that, the first administrator (Abel) had erroneously sold the house as part of the estate though it had been bequeathed to him (appellant) by the deceased before his death. It cannot thus, be said that the proceedings before Mbillu-PCM that led to the second order constituted a proper forum for presenting the will in proving the bequeath. This is because, that was not the forum for determining the issue of whether or not the house was part of estate. Besides, the second order was made even before the first administrator (Abel) had sold the house. It did not also specifically direct him (Abel) to sale the house. It only directed him to distribute the estate without specifying which asset of the estate. The appellant could thus, still present the will in any other proper forum in claiming his right (if any) on the house. No wonder, he instituted other proceedings before the DLHT and this court claiming the house as discussed earlier.

Additionally, it must be clear here that, the complaints against the manner in which the first administrator sold the house was not a subject matter before the District Court according to the chamber summons. In fact, such complaints could be resolved by the primary court itself and not by the District Court on appeal against the second order. Again, even if it

was true that the first administrator had erroneously sold the house, that act would not in any way render the second order illegal for the reasons just shown above. Furthermore, as I observed earlier, the first administrator had to distribute the estate even without the second order since he had that duty vide the first order (dated 17/11/2014) which appointed him administrator of the estate.

It is also on record that, even the submissions made by the learned counsel for the appellant before the District Court did not support the contention that the alleged irregularities in the second order occasioned injustice (see page 4 of the typed proceedings of the District Court). What his counsel argued was only that, upon the second order directing the first administrator (Abel) to distribute the estate, he erroneously sold the house without consulting the appellant as the second administrator and other heirs. He also made arguments challenging the way the first administrator was appointed through the first order (dated 17/11/2024). The respondent's counsel replying submissions before the District Court also defended the first order and contended that the first administrator was properly appointed and he properly sold the house, hence no irregularity was committed.

However, as I observed above, the manner in which the first administrator distributed the estate and the first order that appointed him (the first administrator) were not subject matters for the decision before the District Court vide the chamber summons before it. The submissions by both counsel before the District Court regarding those other two aspect were thus, superfluous.

Indeed, even if it is presumed (without deciding) that the primary court (Mbillu-PCM) committed an irregularity in making the second order as alleged by the appellant, the same did not occasion any injustice to the appellant for the reasons shown above. In fact, I agree with the learned counsel for the appellant that, in law, a point of illegality constitutes a sufficient reason for extending time so that the illegality can be cured. Nonetheless, the same law guides that, not every allegation of illegality will constitute a sufficient reason for extending time. For an allegation of illegality to constitute a sufficient reason it will depend much on the circumstances of each case as guided by the CAT in the **Tanzania Harbour Authority v. Mohamed R. Mohamed [2003] TLR. 76**.

In the matter at hand therefore, even if it is accepted that the second order was irregular for not showing the names of parties who were in court when the same was pronounced, that irregularity is minor. This is because; the appellant did not substantiate his averment that the said order occasioned injustice to him for the reasons shown above. The irregularity was thus, negligible and the second order was thus, saved under section 37 (2) of the MCA. These provisions of this section, as observed earlier, saves decisions of subordinate courts with minor errors that do not cause injustice.

It follows thus that, illegalities envisaged by the law as constituting sufficient reasons for extension of time must amount to serious violations of the law which occasion injustice. Minor irregularities, though may offend the law, cannot be taken as illegalities that constitute sufficient reasons for extension of time. Moreover, the alleged point of illegality in the case at

hand will not assist the appellant amid my above finding that, he was not diligent in pursuing the matter at hand. The CAT in the **Tanzania Harbour Authority case** (supra) was of the view that, a negligent party cannot be left to breach procedural rules and rely on the point of illegality.

Having observed as above, I answer the issue regarding the first and fourth grounds of appeal negatively to the effect that, *there was no any illegality in the decision of the primary court at issue that constituted a sufficient reason for the District Court to grant the application for extension of time*. The first and second grounds of appeal are thus, overruled as well.

Owing to the reasons adduced above, and since I have dismissed/overruled all the four grounds of appeal, I hereby dismiss the entire appeal with costs since costs follow event. It is so ordered.

J.H.K. Utamwa.

JUDGE

04/05/2020

04/05/2020.
CORAM; Hon. JHK. Utamwa, J.
Appellant: present in person.
Respondents; present both and Mr. Alfred Chapa, advocate.
BC; Mr. Patric Nundwe, RMA.

Court: Ruling delivered in the presence of the appellant, both respondents and Mr. Chapa, learned counsel for the respondents, in court, this 40th May, 2020.

JHK. UTAMWA.

JUDGE

04/05/2020.