

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**MOSHI DISTRICT REGISTRY**  
**AT MOSHI**

**PROBATE APPEAL NO. 17 OF 2019**

(C/F Probate Appeal No. 1 of 2019 Moshi District Court originating from Shauri dogo la Mirathi  
No. 66 Of 2018, Mahakama ya Mwanzo Arusha Mjini)

**EREDINA WILLIAM SWAI ..... APPELLANT**

**Versus**

**ANDREA NEHEMIA SWAI ..... 1<sup>ST</sup> RESPONDENT**

**ANNA ANGA SWAI ..... 2<sup>ND</sup> RESPONDENT**

*4<sup>th</sup> JUNE, 2020 & 3<sup>RD</sup> JULY, 2020*

**RULING**

**MKAPA, J:**

The appellant, Andrea Nehemia Swai, is challenging the decision of the District Court of Moshi (1<sup>st</sup> appellate court) in Probate Appeal No. 1 of 2019 delivered on 11<sup>th</sup> July, 2019. Aggrieved, has appealed against the judgment and decree. Before the appeal was heard on merit respondents raised point of preliminary objection to the effect that the appeal is bad in law and incompetent before this Court for being hopelessly time barred.

The preliminary objection was agreed to be disposed of by way of filling written submissions. The appellant appeared in person, unrepresented



while the respondents were jointly represented by Ms. Dorice Kinyoa, learned advocate.

Arguing in support of the objection Ms Kinyoa submitted that section **25 (1) (b) of the Magistrates Courts Act**, Cap 11, R.E. 2002 (the MCA) provides that;

*"in any other proceedings any party if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of decision or order, appeal therefrom to the High Court..."*

She went on arguing that, from the record, the decision to be appealed against was delivered on 11<sup>th</sup> July, 2019 while the present appeal was filed on 11<sup>th</sup> September, 2019 thus the same is hopelessly time barred. Furthering her argument she cited section **3 (1) (2) (c) of the Law of Limitation Act**, Cap 89, [R.E. 2002] which provides for every proceeding which is instituted after the prescribed period of limitation be dismissed whether or not limitation has been set up as a defence.

Ms. Kinyoa submitted further that, the appellant was to file application for extension of time first in terms of section 14 (1) of Cap 89., even if the time spent in obtaining copies of judgment to wit; 30<sup>th</sup> August, 2019 is excluded, still there is a delay of 11 days. In supporting her argument



she cited the decision in the case of **Zilaje V Feubora** (1972) HCD 3 where **Kisanga J.** held that;

*"Court will not readily interfere in order to give remedy where the party seeking such remedy sat on his rights and did not act with reasonable promptitude."*

She finally prayed for the appeal to be dismissed with costs.

In reply the appellant first conceded the fact that the only remedy for filing an application or appeal out of time is to first seek leave to file the said application or appeal explaining reasons for the delay moreover, it is entirely upon the court's discretion to grant extension of time.

She went on submitting that, she was supplied with copy of the judgment on 30<sup>th</sup> July, 2019 without a copy of proceeding or drawn order. She then filed revision to this Court on 5<sup>th</sup> August, 2019 in which the Registrar recommended for her to file an appeal instead of revision hence the present appeal. It was her further contention that she did file application for extension of time under section 25 (1) (b) of MCA which mandates this Court to extend time after the expiry of the first thirty days.



The Appellant further argued that she relied on section 19 (1) (5) of Cap 89 which provides that days spent by the applicant to procure requisite copies for appeal should be excluded in counting the delay. She submitted further that the Registrar granted her 90 days on 9<sup>th</sup> September, 2019 and she filed this appeal on 11<sup>th</sup> September, 2019. She finally submitted that the objection raised has no merit and the same should be dismissed with costs. There was no rejoinder.

Having carefully considered parties' submissions the only issue to be determined is;

***Whether the appeal is time barred***

Respondents have averred that the law requires appeal from District Court to the High Court be filed within thirty days from the day judgment was delivered. In the present appeal, it is undisputed that the judgment was delivered on 11<sup>th</sup> July, 2019 while this appeal was filed on 11<sup>th</sup> September, 2019 (49) days which means a delay of eleven (11) days. In her defence the appellant conceded the fact that she did file the appeal out of time but she had already prayed for extension of time and was granted the 90 days by the Registrar therefore her appeal was not time barred. This argument is a misconception as section 89 of Cap 89 is categorical on the fact as hereunder;-





"14. (1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, **other than** an application Extension of period in certain cases for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application.

(2) For the purposes of this section "the court" means the court having jurisdiction to entertain the appeal or, as the case may be, the application"

In the light of the above provisions in particular subsection 2 the court having jurisdiction to entertain application for extension of time is the one with powers to entertain the appeal or application which extension of time is sought. Therefore applicant's argument that the Registrar granted her 90 days leave to appeal out of time as I said earlier is a misconception.

It is noteworthy that the rationale behind having time frame for various matters in courts is to avoid abuse of court procedures as was held in **Salome Mussa Lyamba V K.K Security (T) Ltd** Lab. Div, 2012 LCCD 198 that;-



*"... limitation is there to ensure that a party does not come to court as and when he chooses".*


The case of **Daphene Parry V Murray Alexander Carson** (1963) E.A. 546 also is informative in discouraging inactions where it was held that;-

*"If the appellant had a good case on the merits but out of time and had no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy, and the appeal should be dismissed as time barred, even at the risk of injustice and hardship to the appellant"*

For the reasons discussed, I sustain the preliminary objection and struck out the Appeal for being time barred with costs. It is so ordered.

Dated and delivered at Moshi this 03<sup>rd</sup> day of July, 2020.



  
**S.B. MKAPA**  
**JUDGE**  
**03/07/2020**