

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
PROBATE APPEAL NO 08 OF 2020

(From the District Court of Mbeya at Mbeya in Misc. Application No. 20 of 2019, Hon. P. D. Ntumo, PRM. Originating from Mbalizi Primary Court in Probate and Administration Cause No. 22 of 2019)

ANNA JOHN MWAMBINGA.....APPELLANT

VERSUS

BAHATI JOHN MWAMBINGA.....RESPONDENT

JUDGEMENT

Date of Hearing : 03/12/2020
Date of Judgement : 17/02/2021

MONGELLA, J.

Following defeat in Mbalizi primary court, the appellant filed an application for extension of time to appeal out of time in the District court of Mbeya. She however did not succeed in this application. Not amused with the decision of the District court, she preferred this appeal seeking for this court to allow the appeal and extend time for her to file the appeal in the District court. The memorandum of appeal presented two grounds being:

1. That the Hon. District court erred in law by delivering a decision against the appellant while holding that the illegality on the

impugned decision for want of jurisdiction and forgery is not sufficient cause for extension of time.

2. That the Hon. District court erred in law by delivering a decision against the appellant while the appellant demonstrated sufficient cause to warrant extension of time.

During the hearing of the appeal which was done orally, the appellant was represented by Mr. Emmanuel Clarence, learned advocate. On the other hand, the respondent enjoyed legal services of Mr. Ezekiel Mwampaka, learned advocate.

Arguing on the first ground, Mr. Clarence contended that the District court erred by not considering the reason of illegality for want of jurisdiction and forgery. Basing on the records of the primary court in which the matter emanated, particularly Form No. 1 which was filed by the respondent, he argued that the said form, at item no. 8, states that the deceased was Christian. Banking on the principle that parties are bound by their pleadings, he argued that the court had to satisfy itself that it had jurisdiction to entertain the matter. He contended that under Item I sub (1) of the 5th Schedule to the Magistrates' Courts Act, Cap 11 R.E. 2019 the primary court, on probate matters, has jurisdiction on customary and Islamic matters only. He contended further that, considering the fact that in Form no. 1 the applicant (now respondent) stated clearly that the deceased was Christian; the primary court then had no jurisdiction to entertain the matter. He was of the view that this was a question of



illegality in the impugned primary court decision for the District court to grant extension of time.

He pointed another illegality basing on forgery. He said that, while the appellant prayed for revocation in the primary court, she raised this issue to the effect that there was an RB connected to the matter pending in the court in a criminal case. He was of the view that as governed by Rule 9 (1) (a) of the Primary Court (Administration of Estates) Rules, G. N 49 of 1971 the primary court ought to have considered the facts raised by the appellant.

Insisting that there are illegalities in the impugned primary court decision, he referred to the case of **Principle Secretary, Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387 in which the Court ruled that where a point of law is at issue, on the illegality of the challenged decision, it constitutes sufficient reason for granting extension of time. He thus prayed for the argument on illegality which they have raised to be upheld and the appellant be granted extension of time.

However, before moving to the second ground, he raised a concern regarding the records of the court connected to the first ground. He pointed out that the argument regarding Form no. 1 stating that the deceased was Christian was never challenged by the respondent when raised in the District court. However, to their surprise, while preparing to argue this appeal, they filed a letter on 21st October 2020 requesting to peruse the court record. Upon perusing, they noted that Item 8 in Form no. 1 has been tempered by changing the religion from "Christian" to

"pagan." He said that the tempering is apparent on face of record and could not be done by the appellant as it was not in her best interest. He was of the view that the act was done purposely to defeat the interest of justice. He prayed for the court to consider this fact.

With regard to the second ground, Mr. Clarence argued that the appellant advanced sufficient reasons to warrant extension of time. He submitted that after the appellant not being satisfied with the results in Probate Cause No. 22 of 2019 issued on 22nd August 2019, she filed an appeal on 20th September 2019, which was within time. Being unrepresented by then, she mistakenly filed petition for probate, intending to challenge the decision, instead of filing petition of appeal. Thereafter, she engaged his firm to represent her. Upon representing her they found preliminary objection being raised by the respondent's advocate. They conceded to the preliminary objection and later applied for extension of time. He was thus of the view that, under the circumstances, it was incorrect for the District court to deny the application for extension of time.

On his part, Mr. Mwampaka vehemently opposed the grounds of appeal. Replying on the first ground, he argued that the issue of illegality was addressed at length by the learned Magistrate in his judgment. He submitted that, the illegality raised is based on the argument that the deceased was Christian. The respondent is the one who filed for letters of administration thus in a good position of knowing the true religion of his father. He also referred to the appellant's testimony whereby she stated that the deceased had eleven wives, her being the eleventh. He referred

to the case of **Samwel Munsiro v. Chacha Mwikwabe**, Civil Application No. 539/08 of 2019 (CAT,unreported) whereby while referring to its previous decision in the case of **Lyamuya Construction Co. Ltd. v. Board of Registered Trustees of Young Christian Women Association**, Civil Application No. 2 of 2010 (CAT, unreported), the Court of Appeal stated that not every applicant who raises a point of law, should as of right be granted the same. The point of law should be of sufficient importance and not involving a long drawn process. Basing on this decision he was of the view that the illegality raised does not suffice to move the court to grant the extension of time.

Mr. Mwampaka argued that they believe the primary court considered the issue of jurisdiction and proceeded to adjudicate the matter after satisfying itself that it had jurisdiction. Addressing on the assertion of tempering with the record in Form No. 1, he argued that the act of the appellant's counsel perusing the court file on 21st October 2020 thereby noticing that the record was tempered with shows that it was his first time to peruse the file. Under the circumstances, Mr. Mwampaka argued that since it was his first time to peruse the file, they believe that what he saw in Form No. 1 in the court file was the correct version. He contended that the learned advocate did not state when he previously perused the court file to tell the difference.

Regarding the issue of forgery, Mr. Mwampaka conceded to the fact that the issue was raised in the letter of application. However, he contended that the argument on forgery was a mere allegation because the said RB was never mentioned anywhere. He further contended that the

appellant's advocate has not clearly explained the kind of forgery he is referring to. He claimed that this issue is new as it was not raised in the lower courts.

On the second ground of appeal, Mr. Mwampaka argued that the applicant never advanced any sufficient cause. He submitted that the applicant stated that she delayed as she was searching for money to engage a lawyer. The appeal was struck out on 28th November 2019 while the application for extension of time was lodged on 18th December 2019. He argued that it is the time between 28th November 2019 and 18th December 2019 which was supposed to be accounted for and the applicant failed to account for. Referring to the case of **Zuberi Nassor Mohamed v. Mkurugenzi Mkuu, Shirika la Bandari Zanzibar**, Civil Application No. 93/15 of 2018 (CAT, unreported) he argued that sufficient cause has to be shown by accounting for each day of the delay.

He argued further that the reason advanced by the appellant in the District court that she was searching for money to engage an advocate was invalid and it was correct for the Hon. Magistrate finding it insufficient. He added that if the applicant's advocate conceded to the preliminary objection on 28th then he should have been prompt in filing for extension of time, instead he waited for further 28 days. He referred the court to the case of **William Shija v. Fortunatus Masha** [1993] TLR 203. He prayed for this court not to interfere with the decision of the District court arguing that there is no base in doing that. He argued so on the ground that the District court judiciously engaged its discretion to refuse extension of time and in

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consideration that both parties were appointed by the primary court as administrators of the estate of the late John Mwifundege.

Mr. Clarence rejoined on some few points. With regard to the jurisdiction of the court, he urged the court to consider their submission in the District court as seen at page 2 of the said submission. He contended that their argument was based on pleadings and the same was replied by the respondent as it appears on page 3 of their submission. He further contended that both the District court and the respondent never addressed the substance of their argument. He was of the stance that if there were different answers regarding the pleadings and even the issue of tempering with Form no. 1, the respondents counsel must have argued them in his submission and the court should have mentioned it. On these bases he challenged the argument by Mr. Mwampaka that the appellant's counsel only perused the court record once. He urged the court to find the argument raised on jurisdiction having merit.

Lastly on reasons advanced for the delay, he urged the court to consider the circumstances leading to the delay as explained in the application letter dated 18th December 2019. He challenged the application of the principles laid down in the case of **Zuberi** (supra) arguing that the circumstances in this case are different from the one in the matter at hand. However, he did not explain how the circumstances differ.

I have duly considered the arguments by both counsels. I have as well read the decision of the District court which denied the applicant extension of time. In reaching its decision, the Hon. Magistrate took into

account the testimony of the respondent that his father had eleven wives thus concluded that he was living customary way of life. On these bases he found the argument by the appellant that the trial primary court had no jurisdiction to entertain the application for letters of administration on a deceased Christian having no merit. However, as argued by Mr. Clarence, the point of contention lied on Form No. 1 filed in the primary court to initiate the proceedings, which stated that the deceased was Christian.

It is a settled principle of law that parties are bound by their pleadings. See: **Makori Wassanga v. Joshua Mwaikambo and Another** [1987] TLR 92; **Peter Ng'homango v. Attorney General**, Civil Appeal No. 114 of 2011 (unreported); and that of **Astepro Investment Co. Ltd v. Jawinga Investment Limited**, Civil Appeal No. 8 of 2015 (unreported). As such, since the point of contention lied on what was filled in Form No. 1, the District court ought to have dealt with the issue as presented in court. Since Form No. 1 initiated the proceedings, the primary court ought to have ascertained if it had jurisdiction to entertain the matter basing on the contents of the form. The question of jurisdiction is sacrosanct and the court has to satisfy itself that it has jurisdiction before entertaining the matter. Where a court entertains a matter without jurisdiction it constitutes an error apparent on face of record and a serious illegality.

The Hon. Magistrate in the District court opted not to consider the illegality apparent on face of record, that is, on Form No. 1 and considered the testimonies of the parties in the trial court. In my settled view this was premature because he dealt with matters that were the subject of the

intended appeal. Where a point of illegality is raised and appears to be apparent on face of record, of sufficient importance and not involving a long drawn process of argument, such as the one raised by the applicant, then the court before which an application for extension of time is filed ought not go into the details of the matter. This is because by doing so the court shall be dealing with an appeal not yet filed in court.

I have gone through the trial primary court record and found that the respondent testified that his father, the deceased, left one wife and then stated that he had eleven wives. It is not known whether the said eleven wives were married to the deceased at the same time or he used to marry another after the other died or divorced. Under the circumstances, it was erroneous for the Hon. Magistrate in the District court to conclude that the deceased lived a customary life and denied extension of time to the applicant. Since in Form No. 1 it was written that the deceased was Christian then it was prudent for the extension to be granted so that the issues of jurisdiction could be discussed and determined on appeal.

I now move to the issue that cropped up during hearing of this appeal. As presented by Mr. Clarence it appears in the court record that Form No. 1 was altered whereby the word "Christian" appears to be scrubbed and on top of it written the word "pagan." Looking closely at it I found the word "Christian" still readable though with difficulty.

Considering the circumstances, I am convinced with Mr. Clarence's contention that Form No. 1 was altered somewhere between the District court and the High Court. This is because if the alteration was genuinely

done in the primary court before the hearing could take place then the same must have been reflected in the proceedings. In addition, the District court did not deal with the question of jurisdiction basing on what was pleaded by the respondent in Form No. 1. If the alteration was done before the matter reached the District court, then the same must have been addressed in the submissions by the parties and the District court decision. Following this observation, it is my finding that in Form No. 1, the religion of the deceased was Christian.

On the illegality related to forgery, I agree with the Hon. Magistrate's finding that the same includes matters of fact and evidence thus not qualifying as an illegality.

With regard to the second ground, it is a settled principle of law that where an illegality is raised then it suffices as a good cause to warrant extension of time. See: **VIP Engineering and Marketing Limited v. Citibank Tanzania Limited**, Consolidated Civil References No. 6, 7, and 8 of 2006 (unreported); **Attorney General v. Consolidated Holding Corporation and Another**, Civil Application No. 26 of 2014 and **CRDB Bank Limited v. George Kilindu and Another**, Civil Application No. 87 of 2009 (unreported). In determining whether an illegality exists or not, the court called upon to grant extension of time need not go deep into the details of the illegality by scrutinizing the evidence adduced by the parties in court. Doing that constitutes dealing with matters which ought to be dealt with in an appeal as it was done by the Hon. Magistrate in the matter at hand.



Given the above observation, I grant the application on basis of illegality. The applicant is given 21 days from the date of this ruling to file her appeal in the District court. The appeal to be determined before another magistrate.

Dated at Mbeya on this 17th day of February 2021


L. M. MONGELLA
JUDGE

Court: Judgement delivered in Mbeya in Chambers on this 17th day of February 2021 in the presence of both parties and Mr. Ramsey Mwamakamba, learned advocate holding brief for Mr. Emmanuel Clarence for the appellant.




L. M. MONGELLA
JUDGE