

**IN THE HIGH COURT OF TANZANIA**

**(IN THE DISTRICT REGISTRY)**

**AT MWANZA**

**PC. CIVIL APPEAL NO. 03 OF 2021**

*(Arising from the District Court of Misungwi in Misc. Civil Application No.  
07 of 2020)*

**PASCHAL THOMAS MARINI & 2 OTHERS----- APPELLANT**

**VERSUS**

**IDDI JOSEPH MARINI & 13 OTHERS-----RESPONDENT**

**JUDGEMENT**

*Last Order: 05.08.2021*

*Judgment Date: 18.08.2021*

**M.MNYUKWA, J.**

Before me is a second appeal against the Ruling of the District Court of Misungwi in Civil Case No. 07 of 2020, which was decided in favor of the respondents.

The background to this appeal is briefly that, the appellants applied for letters of administration following the demise of the late Salala Nhabi in the Probate Case No. 13 of 2018 at Bukumbi Primary Court. The records show that after the issuance of citation, the respondents objected the application on the ground that the appellants are untrusted persons. They also question the legality of

the family meeting that appointed the appellants as administrators of the deceased estate.

In determining the objection, the court ruled out in favour of the respondents. The appellants were aggrieved and appealed to the District Court of Misungwi in the Probate Appeal No 02 of 2019 whereby their appeal was dismissed. Aggrieved again by the said decision, the appellants appealed to the High Court through PC Probate Appeal No. 05 of 2019 whereby the High Court ordered the matter to be to be remitted to the District Court for hearing of the appeal and the preliminary objection raised. As a result, the Probate Appeal No. 02 of 2019 was heard by another magistrate in which on the day of hearing, the respondent raised a preliminary objection that the appeal was time barred. The appellant conceded on the prayer and prayed to withdrawal the appeal in order to follow the required procedure. The court granted the prayer and consequently dismiss the appeal. After the dismissal order, the appellant filed Civil Application No. 07 of 2020 which is an application for extension of time to file an appeal against the decision of the primary court. The respondents raised a preliminary objection that the application was bad in law and abuse of the court process. Upon hearing the preliminary objection, the court

uphold it and ruled out that if the application will be heard and determined it will be res judicata dismissed.

The appellants were further aggrieved by the Ruling of the District Court of Misungwi and filed the present appeal with the following grounds:

1. That the District Court erred in law and in fact for dismissing the application which was not heard and determined on merits.
2. That the District Court erred in law and in fact for dismissing the application basing on wrong principles and /or provisions of the law.

The Appeal was argued by the way of written submissions; I thank parties for complying with the schedule of the court. The appellants filed their written submissions on 19.07.2021, the respondents' reply was filed on 27.07.2021 and there was no rejoinder filed. The appellant had a service of Ng'wanzalima Kushigwa Mponeja and the respondent afforded the services of Eric Katemi learned counsel.

Submitting on the first ground of appeal, he claimed that the District Court erred in law and fact for dismissing the application which was not heard and determined on merits. He avers that the

application before the District Court was for the extension of time to file an appeal which were earlier dismissed for being hopelessly time-barred. He went on to submit that, the respondents challenged the application by way of preliminary objection which succeeded and the trial court dismissed the application. He claims that the trial court ought to struck out and not dismissing the application. Supporting his argument, he cited the cases of **Ngoni – Matlego Co-operative Marketing Union Ltd vs Alimamohamed Osman** [1959] E.A and the case of **Yahya Athumani Kisesa vs Hadija Omari Athumani & 2 Others** Civil Appeal No. 105 of 2014, CAT. He insisted that, dismissing the application was against the principles of law and ended praying this court to allow this ground of appeal.

On the 2<sup>nd</sup> ground of appeal, he claims that the District Court erred in law and fact for dismissing the application basing on the wrong principle of law. He avers that the trial court erred in dismissing the application relying on section 3(1) of the Law of Limitation Cap. 89 [RE: 2019] which he claims that the proper provision that could be used was the Magistrates' Courts Act [Cap. 11 RE 2019] read together with the Civil Procedure [Appeal in Proceedings Originating in Primary Court] Rules, G.N No. 312 of 1964. Referring to the Probate appeal No. 02 of 2019 which was

dismissed for being time-barred, he insisted that if at all section 3(1) of the Law of Limitation was properly applied the matter could have been struck out instead of being dismissed. Supporting his arguments, he cited the case of **Mabibo Beer Wines and Spirits Limited vs Fair Competition Commission and 3 Others** Civil Application No. 132 of 2015 CAT at Dar es Salaam, and the case of **Judith Emmanuel Lusohoka vs Pastory Binyura Mlekule & 2 Others**, Misc. Land Case Application No. 74 of 2018, HC at Tabora and section 3A (1), (2), 3(B)(1)(a) and (b) of the Civil Procedure Code Cap 33 RE: [2019]. He insisted that, since the Probate Appeal No. 02 of 2019 was wrongly dismissed and not struck out, it was wrong for the subordinate court to dismiss the application for extension of time to refile the same.

In the circumstance, the learned counsel for the respondents in responding he prays this court to dismiss the appeal for being devoid of merit and wanting of legal justification.

Responding on the first and second grounds of appeal, Mr. Erick avers that the District Court was right to dismiss the application for extension of time since the appeal which is referred to has been dismissed by the same trial District Court. He avers that, the required procedure was for the appellant to appeal against the dismissal

order. Supporting his argument, he cited the decision of this court in the case of **Habiba Abdalah Edha vs Africaries Limited**, Misc. Commercial application No. 254 of 2018, HC at Dar es Salaam [Unreported].

He went on to state that, the appellants' contention for the extension of time was wrong in regards to the Probate Appeal No 02 of 2019 which was dismissed for being time-barred because allowing the application for extension of time was to revive the dismissed appeal which the same will attract res-judicata.

Having gone through the learned advocates' written submissions, the only issue for determination in this application is whether the trial court erred in dismissing the application for extension of time.

On the first ground of appeal the appellants' advocate submitted that the application was not heard and determined on merit, I have dispassionately considered this ground based on the circumstance of this appeal. Having in mind that this is an appeal against the dismissal order of the Misc. Civil Application No. 07 of 2020 seeking an order for extension of time to file appeal towards the application stood dismissed by the trial court for being time bared. On records, the application was dismissed after the

respondent raised preliminary objection to the effect that the application and the prayer was bad in law.

Going through the available records, it is worth to note that the appeal which was to be filed subject to the granting of the prayer of the extension of time was determined to its finality and it was respectively dismissed. To this point, I agree with the respondents' learned counsel that the appellant learned advocate took a wrong route on demanding what he believed to have been the rights of the appellants.

I have gone through the cited cases of **Ngoni – Matlego Co-operative Marketing Union Ltd vs Alimamohamed Osman** [1959] E.A 577 and the case of **Yahya Athumani Kisesa vs Hadija Omari Athumani & 2 Others** Civil Appeal No. 105 of 2014, CAT at Dar es Salaam [unreported]. It is a trite law that the proper way of dealing with a suit, an appeal or an application which is not determined on merit is to struck it out rather than dismissing, but to the issue at hand, the circumstances are different.

First, the application sought was bad in law because it was meant to restore a finalized appeal which was stood dismissed and the same would attracts res-judicata. Secondly, the appellant took a wrong route appealing against the application for extension of

time which was dismissed rather than appealing against the dismissal order of the Probate Appeal Case No. 02 of 2019 of the District Court of Misungwi, if at all he was contended that the appeal which was before the trial court after it was found to be time-barred was supposed to be struck out and not dismissed as it was done by the trial court. And, thirdly, dismissing or struck out of an application, suit or appeal depends on the circumstances of each case. The law provides under section 3[1] of the Law of Limitation Cap. 89 [RE: 2019] that any proceedings instituted after the time limit shall be dismissed whether or not limitation has been set up as a defence.

In the case of **MM Worldwide Trading Company Limited and Two others vs National Bank of Commerce Limited**, Civil Appeal No 258 of 2017, CAT at Dar es Salaam, the Court among other things held that:

*" It is clear to us that irrespective of the words used, the final order amounted to a conclusive determination by the trial court disposing of the former suit for being time barred. In our view, it was not open for the respondent to institute the fresh suit as it were, simply because the trial court struck out the former suit rather than dismissing it as mandated by section 3[1] of the Act".*



This position has been pronounced in various decisions of the Court of Appeal of Tanzania, few of which has been cited in the case of **MM Worldwide Trading Company Limited** [supra] are **East African Development Bank v Blue Line Enterprises Limited**, Civil Appeal No. 101 of 2009, **Hashim Madongo and Two others v Minister of Industry and Trade and Two others**, Civil Appeal No. 27 Of 2003 and **Olam Uganda suing through its Attorney United Youth Shipping Company Limited v Tanzania Harbours Authority**, Civil Appeal No. 57 of 2002 [All unreported]

Guided by the above decisions of the Court of Appeal of Tanzania, and for the reasons stated therein, with carefully scrutiny and application of the legal mind, I find the issue for limitation of time was conclusively determined by the trial court as it was rightly held by the trial court that entertainment of the present application for extension of time, it will attract res-judicata. The same position was taken by the Court of Appeal of Tanzania in the case of **MM Worldwide Trading Company Limited** [supra]. Thus, the first ground of this appeal is devoid of merit and consequently fails.

On their second ground of appeal, the appellants contended that the trial magistrate dismissed the application basing on the

wrong principle of law. Going through the appellants' learned counsel submissions, I find that the learned counsel gets lost in the way.

Before me, is an appeal against the decision of the District Court of Misungwi in Misc. Civil Application No. 07 of 2020 while the learned counsel submission is in regard to Probate Appeal No. 02 of 2019. It is a trite law that submissions should reflect what is before the court. The issue for consideration in the present appeal is whether the application for extension of time was proper before the trial court.

After my careful scrutiny and application of the legal mind in his submissions and his cited cases, I don't see relevancy to this ground of appeal. It is my considered view that if the appellants wished to challenge the decision of Probate Appeal No 2 of 2019 the best approach was to challenge the said decision at the trial court either by way of review or by way of appeal to this Court. For this reason, I did not labour to the submissions that are not relevant to the present application and, in the upshot, this ground fails as well.

In the final analysis, I find that the appeal fails in its entirety and it is therefore stands dismissed. I make no order as to costs since this is a probate matter that involves relatives. It is so ordered.

Right of appeal explained.



  
**M. MNYUKWA**  
**JUDGE**  
**18/8/2021**

Judgement delivered on 18<sup>th</sup> day of August 2021 through Audio Teleconference whereby the advocates of the parties were remotely present.

  
**M. MNYUKWA**  
**JUDGE**  
**18/8/2021**