

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

**MISC. CIVIL APPLICATION NO. 02 OF 2021**

*(Originating from Appeal No. 03 of 2020 of Sumbawanga District Court  
Original Probate Appeal No. 70 of 2020 of Sumbawanga Urban Primary  
Court)*

**BONIVENTURA S/O SAMWEL .....APPLICANT**

**VERSUS**

**MICHAEL MASATU**

**GRACE MSATU**

**ESTER MASATU**



**RESPONDENTS**

**RULING**

*Date of Last Order: 24/ 05/ 2022*

*Date of Ruling: 15/ 07/ 2022*

**NDUNGURU, J**

This is a ruling in respect of the application made under section 25(1) of the Magistrate Court Act, Cap 11 RE 2019, Order XLIII Rule 2 of the Civil Procedure Code, Cap 33 RE 2019, and Section 14 (2) of the Law of Limitation Act. Cap 89 RE 2019 by the applicant, Boniventura Samwel, seeking leave of this court to file the appeal out of statutory time. The

application is supported by the affidavit sworn, drawn and filed by the applicant himself. Upon being served with notice of this application, the respondents filed their counter affidavit and raised preliminary objection on point of law that the application is incompetent as it is taken by event.

At the hearing of the preliminary objection the applicant and the first respondent appeared in persons, unrepresented while 2<sup>nd</sup> and 3<sup>rd</sup> respondents were absent on notice. The fact that 2<sup>nd</sup> and 3<sup>rd</sup> respondents were hardly available, this court ordered for the objection be heard by way of written submissions for the interest of justice.

Arguing in support of the preliminary objection, the respondent through the legal service of Mr. Peter Kamyalile submitted that the application is incompetent for failure to be accompanied by the petition of appeal or grounds of objection to the decision or order. Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G. N No. 312 of 1964 requires that every application for leave to appeal out of time for all matters originating in Primary Courts shall be accompanied by the petition of appeal or grounds of objection to the decision or order. Its

consequences are to render the application incompetent and it ought to be struck out.

Mr. Kamyalile fortified his position to the case of this court of **Asha Saidi vs Given Manyanga and Another**, Misc. Civil Application No. 28 of 2003, DSM, unreported. Mr. Kamyalile submitted that the present application is incompetent and it ought to be struck out.

As well, Mr. Kamyalile further submitted that the instant application has been taken by event since the applicant has been revoked to be administrator of Ladislaus Masatu Egobi on 19<sup>th</sup> day of February 2021. He reminded this court to take judicial notice as attached on counter affidavit as per the case of **Atlantic Electric Ltd vs Morogoro Region Cooperative Union** [1984] Ltd [1993] TLR 12.

In reply, Mr. James Lubus submitted that no where the learned advocate for the respondent has argued on issue that the application is incompetent as it taken by event meanwhile, he raised new facts of non-attachment of copy of petition of appeal and cited the case which is not applicable to the matter at hand.

Further, Mr Lubus submitted that as to the general rule, procedural rules are hand maiden in the administration of justice, that they are there to facilitate the dispensation of substantial justice, therefore a strict construction of the law technicalities is discouraged. That all rules should be given a literal interpretation. Rules of procedure do not give parties any right rather than they only provide for the mode of settling disputes. He insisted that the emphasis should be on the substance of the matter rather than technicalities.

He finally prayed for the preliminary objection be struck out with costs.

Having heard the submissions of the parties, the vital question is whether the point of preliminary objection stand.

It is very clear that the applicant was supposed to appeal within 30 days after the impugned judgement or order of the Primary Court as per **rule 3** of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules G.N No. 312 of 1964.

Failure to comply with the above rule, one has to obtain extension of time from the court and extension of time is upon judicial discretion, thus he had to establish "*a good and reasonable cause.*"

In this application, the applicant has moved this court to extend time for him to appeal out of time after the statutory time has elapsed.

However, the law demands an application for leave to appeal out of time for all matters originating from a decision or order of a primary court, shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order against which it is desired to appeal.

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.

As hinted above, it is the position of the law that every application for leave to appeal out of time for all matters originating in primary court shall be accompanied by the petition of appeal or grounds of objection to the decision or order as per **Rule 3** of the Civil Procedure (Appeals in

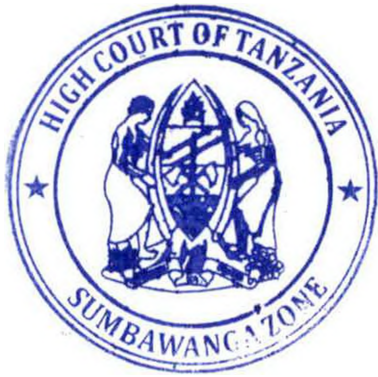
Proceedings Originating in Primary Courts) Rules [supra] as rightly submitted by the learned advocate for the respondents.

In this application, where leave is sought to appeal, the applicant has not complied with the mandatory provisions of the Rules, he has not accompanied the petition of appeal or grounds of objection to the decision or order as per above rule, thus, the failure of which can not be salvaged by the principle of overriding objective or article 107A of the Constitution of the United Republic of Tanzania, since it is a mandatory requirement of the law.

That being the position, I am of the considered view that the applicant has not complied with the mandatory requirement of the law by his failure to attach the petition of appeal or grounds of objection, thus the preliminary objection by the respondents is sustained. The application is therefore incompetent as said above.

With the above observation, I subscribe to the position of the case of this court of **Asha Saidi vs Given Manyanga and Another** [supra] as cited to me by the learned advocate for the respondents, thus the application is incompetent and I proceed to strike out with costs

Order accordingly.



**D.B. NDUNGURU**

**JUDGE**

**15. 07. 2022**

