

**THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(DISTRICT REGISTRY OF MBEYA)
AT MBEYA
PC CIVIL APPEAL NO. 18 OF 2021**

(From the District Court of Mbeya at Mbeya (Hon. D. G. Luwungo, RM), in
Misc. Civil Application No. 42 of 2020. Originating from Urban Primary
Court in Civil Case No. 29 of 2020.)

HOBOKELA MWANKINA.....APPELLANT

VERSUS

GETRUDE SEBASTIAN.....RESPONDENT

JUDGMENT

Date of Last Order: 02/06/2022
Date of Judgment: 14/07/2022

MONGELLA, J.

This matter emanates from the Urban primary court in Mbeya City in Civil Case No. 29 of 2020. In the said case the respondent sued the appellant for T.shs. 4,698,000/- being price for Kilimanjaro Aloe vera juice she supplied to her. The appellant admitted part of the claim being T.shs. 810,000/- which involved 5 boxes of the Aloe vera juice. After the hearing the trial court ruled in favour of the respondent. Aggrieved by the decision, the appellant wished to file an appeal in the district court of Mbeya. However, noting that she was time barred she filed first an application for extension of time to file the intended appeal out of time.

The application faced a stumbling block whereby the respondent filed notice of preliminary objection challenging the competence of the application. The gist of the preliminary objection was to the effect that the application was not accompanied by the prospected grounds of appeal as required under the law, thus incompetent before the court. In his ruling, the Hon. Magistrate sustained the preliminary objection on the ground that the application offended the mandatory provisions of **Section 20 (4) (a) and (b) of the Magistrates' Courts Act, Cap 11 R.E. 2019**; and of **Rule 3 of the Civil Procedure (Appeal in Proceedings Originated from Primary Court) Rules, G.N. No. 312 of 1964**. Aggrieved further by the decision, the appellant preferred the appeal at hand on three grounds to wit:

1. *That the trial Magistrate erred in law for denying the advocate for the applicant the chance to give the grounds of appeal orally.*
2. *That the trial Magistrate erred in law in facts for not putting into record what the court itself said after the advocate of the appellant prayed before the court of law to tender grounds of appeal orally.*
3. *That the trial Magistrate erred in law for sustaining the preliminary point of objection of the respondent which had no any proof of any citation of law.*

The appeal was argued by written submissions following the prayer by both parties which was granted by the Court. The appellant engaged legal services of Mr. Ayubu Mwakalonge, learned advocate.



Arguing on the 1st ground, Mr. Mwakalonge submitted that it is the position of the law that when an application for extension of time is made before the district court, the district court has a mandate to permit the applicant to state the grounds for his appeal orally and the court shall record it. In support of his argument he referred to section 20 (4) of the Magistrates' Courts act and Rule 3 of the Civil Procedure (Appeal in Proceedings Originated from Primary Court) Rules, G.N. No. 312 of 1964. However, he said, the district court acted contrary to the law by not considering the grounds of appeal stated orally by the appellant's advocate and ruled that the grounds of appeal should be in written form and the same be attached to the application.

Regarding the 2nd ground, he argued that it is the requirement of the law that the court has a duty to record each and every thing stated by the parties. He faulted the Hon. Magistrate for not recording the grounds of appeal that were stated orally by the appellant's counsel before it whereby the prayer to state the grounds orally was made. He added that the refusal to hear and record the appellant's grounds of appeal was a denial of the appellant's right to be heard.

On the 3rd ground, he contended that it is the requirement of the law that a preliminary objection must arise from the law. To that effect he cited the case of **Mukisa Biscuit Manufacturing Co. Ltd. vs. West End Distributors Ltd.** (1969) E.A. 696. He challenged the respondent's preliminary objection in the district court on the ground that no provision of the law in which her preliminary objection was founded was cited. He said that the respondent's preliminary objection based on mere words which were also

contrary to the law under section 20 (4) of the Magistrates' Courts act and Rule 3 of the Civil Procedure (Appeal in Proceedings Originated from Primary Court) Rules, G.N. No. 312 of 1964.

In the circumstances, he prayed for the decision of the district court to be set aside for interest of justice and the appeal be allowed with costs. However, apart from the prayer to allow the appeal, Mr. Mwakalonge also prayed for this court to call for and examine the records of the district court. He prayed so arguing that in the primary court a prayer to have the case transferred to the district court was made and granted. However, when the matter was called in the district court it was noted that the primary court had already entered a decision. He argued that the primary court decision was entered while the case was partly heard and the district court advised that an appeal should instead be filed. In the premises he prayed for the record to be examined and revised for this Court to satisfy itself as to the transfer of the matter.

The respondent appeared in person. In her submission, she first addressed the prayer by the appellant to have the lower court record called, examined and revised. On that, she argued that the matter at hand is an appeal governed under **section 25 of the Magistrates' Courts Act**. In the premises she was of the view that this court cannot assume its supervisory powers to revise the record. She added that the appellant did not move the court properly if he wished to have the lower court record examined and revised. She referred a decision of this Court in the case of **Mathew T. Kitambala vs. Rabson Grayson and Another**, Misc. Criminal Application No. 38 of 2018 (HC at Mbeya, unreported) to support her argument.

Replying to the 1st ground, she argued that it is trite law that when a party seeks for enlargement of time from a decision of primary court he/she is obliged to comply with the requirement of **Rule 3 of the Civil Procedure (Appeal in Proceedings Originated from Primary Court) Rules, G.N. No. 312 of 1964**, which requires the application for extension of time to be in writing and to set out the reasons why the petition of appeal was or could not be filed in time and to be accompanied by the petition of appeal or set out the grounds of objection to the decision or order.

She argued further that the above provision is couched in mandatory terms, but the appellant's application in the district court was not accompanied by the petition or reasons as to why the petition was not filed within 30 days. She contended that given the defects, the district court had no choice than to strike out the application. She added that Rule 3 of G.N. 312/1964 does not allow the court to allow the appellant to state reasons while the same was not in writing or accompanied by petition of appeal.

Addressing the 2nd ground, she contended that the appellant's counsel wants to mislead the Court on the argument that the district court was duty bound to record the arguments adduced by the party in the application. She insisted that the law is very clear that the grounds of appeal must be adduced first in writing and accompany the application, then be orally explained before the court. Referring to the record of the trial court, she argued that the record does not show the appellant praying to adduce the grounds orally. She added that the appellant's counsel only argued on the position of the law as provided under **section**

20 (4) of the Magistrates' Courts act and Rule 3 of the Civil Procedure (Appeal in Proceedings Originated from Primary Court) Rules, G.N. No. 312 of 1964.

On the 3rd ground, while agreeing with the position settled in the case of **Mukisa Biscuit Manufacturing Company Ltd.** (supra), she was of the view that the appellant's counsel misconceived the preliminary objection she raised as the same was purely on a point of law. She prayed for the appeal to be dismissed with costs for want of merit.

After considering the arguments by the parties and gone thoroughly through the lower court record, I wish first to address the appellant's prayer for this Court to call for and examine the lower court record to satisfy itself as to the transfer of the case from the primary court to the district court. As correctly argued by the respondent, I find the prayer misconceived. The matter before this Court is an appeal against the decision of the district court. In the premises, the lower court record cannot be called, examined and revised. The Court only deals with the grounds of appeal. If the appellant wished for the record to be called for and examined, she should have properly moved the court. The prayer is therefore disregarded.

Coming to the gist of the appeal, it is clear that the appeal at hand lies against the district court's decision which sustained the preliminary objection raised by the respondent on the competence of the application by the appellant for extension of time to file an appeal. The gist of the preliminary objection was that the application was not

accompanied by a petition of appeal and or did not contain the grounds of objection or order.

During hearing of the preliminary objection, as well as in his submission in the appeal at hand, the appellant and his counsel, Mr. Mwakalonge, relied on section 20 (4), particularly **section 20 (4) (b) of the Magistrates' Court Act**. This is because his arguments are centred on this specific provision whereby in his understanding, the grounds of appeal could be set out orally before the court during hearing of the appeal. For ease of reference the said provision states:

- "20 (4) Notwithstanding the provision of subsection (3)-*
- (a) The district court may extend the time for filing an appeal either before or after such period has expired; and*
 - (b) If an application is made to the district court within the said period of thirty days or any extension thereof granted by the district court, the district court may permit an appellant to state the grounds for his appeal orally and shall record them and hear the appeal accordingly.*

From the above quoted provision, I can say that, in application for extension of time in the district court, the relevant provision is section 20 (4) (a) which empowers the district court to extend time for filing an appeal either before the time limit expires or after it expires. The provision of **section 20 (4) (b)** do not apply on application for extension of time to appeal after expiry of the time limit, but on the appeal after the extension of time is granted or where the application was filed within time. The

grounds of appeal therefore, under the provision, can be stated orally before the district court on an appeal whereby the district court is required to record the grounds and hear the appeal accordingly. I therefore find that Mr. Mwakalonge, totally misconceived the application of section 24 (4) (b) of the Magistrates' Courts Act.

Having observed as above, the relevant provision governing extension of time to file an appeal in the district court is **Rule 3 of the Civil Procedure (Appeal in Proceedings Originated from Primary Court) Rules, G.N. No. 312 of 1964**. For ease of reference the provision provides that:

"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 district court in the exercise of its appellate jurisdiction shall be in writing and shall set out the reasons why a petition of appeal was not or could not 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 ground of objection to the decision or order."
[Emphasis added]

The above provision as it clearly goes, sets several mandatory conditions for an application for leave to appeal out of time to a district court against a decision or order by the primary court. The conditions are: **first**, the application must be in writing; **second**, the application must set out the reasons for the delay in filing the appeal within time; **third**, the application must either be accompanied by the petition of appeal, or set



out the ground(s) of objection to the decision or order of the primary court.

In the matter at hand, it is undisputed that no petition of appeal accompanied the appellant's application for extension of time. It is also undisputed that the grounds of objection to the primary court's decision or order were set out in the application. This undisputed fact is proved by the appellant's counsel's argument that the grounds of objection could be orally communicated to the court, which I have already ruled it to be a misconception of the provisions of section 24 (4) (b) of the Magistrates' Courts Act.

What the law meant by providing that the application "*shall set out the grounds of objection to the decision or order*" is that in the affidavit supporting the chamber application, the applicant ought to state the grounds of objection to the decision or order. I have gone through the appellant's affidavit filed in the district court and found it containing no grounds of objection to the decision or order by the primary court.

My observation on the 1st ground of appeal, as above, renders the 2nd ground redundant. However, on the claim that the Hon. Magistrate never recorded what the appellant's counsel stated in court, I wish to remark that, the record of the court is taken to be correct and sacrosanct and cannot be easily impeached, unless there are serious errors on face of record, which is not the case in the matter at hand. See: **Alex Ndendya v. The Republic**, Criminal Appeal No. 207 of 2018, (CAT at Iringa, unreported); **Halfani Sudi v. Abieza Chichili** [1998] TLR 527 and **Shabir F. A.**

Jessa v. Rajkumar Deogra, Civil Reference No. 12 of 1994 (unreported).
The ground is therefore found to be baseless.

I shall as well not allow the 3rd ground to detain me much. As conceded by both parties on the decision in **Mukisa Biscuit Manufacturing Company Limited** (supra), a preliminary objection is supposed to be based on a pure point of law. The preliminary objection raised by the respondent in the district court was purely on point of law as observed hereinabove. This ground is also found to lack merit.

In the upshot, I find nothing to fault the district court's decision sustaining the respondent's preliminary objection. The appeal is found to lack merit and is dismissed with costs.

Dated at Mbeya this 14th day of July 2022.


L. M. MONGELLA

JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 14th day of July 2022 in the presence of the respondent appearing in person, and Mr. Lugano Mwalubunju, legal officer from the appellant's counsel's firm.




L. M. MONGELLA
JUDGE