

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA DISTRICT REGISTRY)

AT MWANZA

PC PROBATE APPEAL NO. 15 OF 2021

(Arising from Misc. Probate Application No. 99 of 2021, originating from Urban
Primary Court Probate No. 50 of 2007)

LEILA JOHN KUSINDAH..... APPELLANT

VERSUS

JEREMIAH L. KUSINDAH..... RESPONDENT

RULING

20/9/2022 & 28/10/2022

ROBERT, J:-

Having been dissatisfied with the ruling of the District Court of Nyamagana which dismissed Miscellaneous Probate Application No. 99 of 2020 for lack of merit, the appellant lodged this appeal armed with three grounds of appeal seeking to challenge the impugned ruling.

The appeal was scheduled for hearing on 20/09/2022 whereupon the learned Advocate for the respondent raised two points of preliminary objection to the effect that;

- 1. The appeal contravenes the requirement of Order XXXIX Rule 1 of the Civil Procedure Code.*

2. The appeal is incompetent because it is accompanied with the ruling and extract order which are not signed by the District Court.

The Court invited parties to argue the points of objection along with the grounds of appeal with a view that if the points of objection are not sustained the appeal will be decided on merit.

Submitting on the first point of objection, the learned Advocate for the respondent, Mr. Njelwa, argued that Order XXXIX Rule 1 of the Civil Procedure Code (supra) requires every appeal to be accompanied with a copy of the decree or extract order appealed against. In this appeal however, the extract order appealed against, that is, Misc. Probate Application No. 99 of 2020 has not been attached. The order attached is Misc. Probate Application No. 99 of 2021. It was his further argument that since the attached extract order is different from the one against which this appeal lies, then it was his conclusion that the appeal has been filed without the extract order and thus liable to be struck out for being incompetent.

Coming to the second point of objection, he argued that the law requires that judgment, ruling, decree or extract orders must be signed by Magistrates who prepared them. He submitted that although he had no specific provision of the law which imposes that requirement, he was

certain that that is the position. He submitted further that the signature is to be fixed by handwriting at the end of the decision and the reason is that it acts as a mark identifying a person who made the said decision. He referred the Court to the impugned decision and extract order of the District Court and noted that the two documents contain no signature of the Magistrate who composed them thus the appeal should be struck out.

Replying to the first point of preliminary objection, the learned Advocate for the appellant, Mr. Tuguta, submitted that it lacks legal backing thus should be dismissed. He argued that this dispute originates from the Primary Court Probate Cause No. 50/2007 thus the provisions of Civil Procedure Code (*supra*) requiring attachment of decree or extract order to an appeal do not apply.

He insisted that the provision applies to matters originating from the High Court, Court of a Resident Magistrate or District Court as courts of first instance. He averred that the provisions applicable are the Magistrate's Courts Act and the rules made thereunder. He concluded that the objection is misconceived and should be dismissed.

As for the difference in the citation of the year in the extract order and the ruling, he submitted that the defect is minor and thus can be rectified even by this court. He reminded the court of the overriding

objective principle requiring courts to ignore minor irregularities in order to determine substantive rights of parties. He prayed the error be considered as a typo that does not go to the root of the matter and make directions to rectify the same.

On the second point of objection, he submitted that there is no any provision of the law that has been violated to make this a point of preliminary objection. He submitted further that the objections do not arise from the air, there has to be a provision of the law that has been violated. It was argued further while referring to the impugned ruling and order, that the same were signed as they contain the name of the maker who is "**J.I. Ryoba, RM**". It was his view that there is no format on how a signature should look like therefore it can be in the form of initials. He further insisted that both the ruling and extract order bear a signature of the person who certified them and that person is undoubtedly the one who signed both documents.

It was his conclusion with respect to the points of preliminary objection that both should be overruled and an order for costs be determined by the court since parties are siblings.

In his rejoinder submissions, the counsel for the respondent reiterated his earlier position that the appeal has contravened provisions

of Order XXXIX Rule 1 of the CPC for failure to attach the impugned order. With regards to Mr. Tuguta's argument that the cited order is inapplicable, he stated that the same is applicable because the impugned ruling emanates from the District Court not Primary Court. On the issue of application of the overriding objective principle, he submitted that the principle does not cure everything as it cannot override mandatory provisions of the law.

On the prayer for rectification, it was his argument that the same cannot be ordered at this stage as it will amount to pre-empting of the objection.

As for the second point of objection, it was his rejoinder that the ruling and extract order attached in the present matter were not signed. He admitted that the two documents there is certification and a signature at the certification stamp on both documents but the said documents were not signed by the Magistrate who made them. He reiterated his earlier position that this appeal is incompetent for lack of the magistrate's signature on both impugned ruling and extract order.

Having considered the rival arguments of both parties, I will pose here and make a determination on the merit of the objections raised.

Starting with the second point of preliminary objection in which counsel for the respondent faulted this appeal for being accompanied with unsigned ruling and extract order of the District Court and called upon this Court to strike out the appeal. From the outset, this court agrees with the argument put forward by the learned Advocate for the respondent that failure to sign judgments, rulings or orders arising therefrom is a fatal irregularity. As the impugned unsigned decision is of the District Court, the law under Order XX Rule 3 and 7 of the Civil Procedure Code provides for the mandatory requirement on the part of judicial officers (Judges and Magistrates) to sign the judgments, rulings, orders as well as decrees. The provisions of Order XX Rule 3 states that;

*"The judgment shall be written by, or reduced to writing under the personal direction and superintendence of the presiding judge or magistrate in the language of the court and **shall be dated and signed by such presiding judge or magistrate as of the date on which it is pronounced in open court** and, when once signed, shall not afterwards be altered or added to, save as provided by section 96 or on review".*

Order XX Rule 7 provides for a mandatory requirement to have the decree signed too. It states that;

*"The decree shall bear the date of the day on which the judgment was pronounced and, when the Judge or Magistrate has satisfied himself that the decree has been drawn up in accordance with the judgment, he **shall sign the decree**".*

It is thus clear from the quoted provisions that having the court decisions and orders signed is a mandatory requirement of the law.

Having perused the attached impugned ruling and extract order of the District Court, it is obvious that the two impugned documents do not bear the signature of the Magistrate who made them. It is apparent that there is a signature fixed to the stamp certifying that the documents are true copies of the original but the space left for the signature of the Magistrate on top of the name is left blank. This Court is not convinced with the argument made by Mr. Tuguta that the person who appended his signature to certify the documents as the true copies of the original is the same person who made the documents. Even if it was the same person, that does not preclude the maker of the documents from signing the said documents as the original documents will remain unsigned by the maker while the signature in the certified copy is only intended to indicate that the document is the same as the original.

On the foregoing, this Court finds that, the impugned ruling and its extract order were supposed to bear a signature of a Magistrate who prepared them. A mere signature certifying the ruling and its extract order to be true copies is not enough and cannot save the purpose. That said, this Court agrees with the learned counsel for the respondent that this appeal is incompetent for want of proper decision and order against which it lies. Thus, I proceed to strike out this appeal with leave to refile a fresh appeal within fourteen (14) days from the date the appellant receives a properly signed ruling and extract order. I make no order as to costs.

It is so ordered.




K.N. ROBERT
JUDGE
28/10/2022