

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA DISTRICT REGISTRY**

**AT MUSOMA**

**PC CIVIL APPEAL NO. 64 OF 2022**

*(Arising from the decision of the District Court of Musoma at Musoma in Misc. Civil*

*Application No. 20 of 2021)*

**AGRIPA FARES NYAKUTONYA..... APPELLANT**

**VERSUS**

**BARAKA PHARES NYAKUTONYA..... RESPONDENT**

**RULING**

**M. L. KOMBA, J;**

In this appeal, the applicant is challenging decision of the District Court of Musoma at Musoma in Misc. Civil Application Number 20 of 2021. The appellant who was then applicant applied for extension of time to challenge decision of the Musoma Urban Primary Court in Probate Cause No. 61 of 2020. The Application was dismissed regardless of it being heard twice and two ruling was delivered both indicating that the appellant failed to account for each day of delay. Appellant believes that there is illegality in the trial court decision which is the good cause for extension of time, from that, he filed this appeal with two grounds in Kiswahili language which can be summarized as;

- 1. The district court erred in law and in fact to decide that the issue of Primary Court lacking jurisdiction cannot be raised and entertained at the District Court during application for extension of time.*
- 2. The district court erred in law and in fact for failure to consider time within which the appellant was looking for an advocate to represent him in court.*

When the petition was served to the respondent, Counsel for respondent Mr. John Seka filed preliminary objection and pray for it to be first entertained before hearing of an appeal. The preliminary objection was to the effect that;

1. The petition of appeal which filed electronically by the appellant was not signed contrary to section 25(3), 34 (1)(iii) and 37(3) (c) of the Magistrate Court Act.
2. Failure to sign the petition of appeal by the appellant who is in prison there is likelihood that the appellant did not instruct the counsel to file petition of appeal and therefore it admission was a mistake.

It is tradition in our court system when the preliminary objection raised must first be entertained before determining the matter on merit.

When he was called upon to make his submission in support of the objection, Mr. Sekas' arguments on the preliminary objection are to the effect that the petition is incompetent because the same was filed without being signed. According to the learned counsel, the court is not supposed to entertain the said petition because it was filed contrary to section 34 (1)(b)(iii) of Magistrate Court Act, Cap 11 (herein after will be referred as Cap 11) which necessitated the petition to be signed by an advocate or the appellant. According to Mr. Seka the document is not signed while Mr. Nyamwelo presents that the document is faint but it was signed and throw the burden to District Magistrate Court Printer as he said he filed it online and that the District Magistrate is the one made it in hard copy is the one to be blamed. Mr. Seka maintained that the petition is defective and it should not be regarded and the same must be dismissed with costs. He further submitted that he is aware that there is recent development of the law which introduced the overriding objective, he said the principle can be used when there is a need of doing so. He proceeded that they are also aware this court and CAT had different observation on the use of Overriding Objective principle when there is no negligence or mistake on the side of who rely on it. Mr. Seka bolster his argument by citing the decision by Makame, Justice of Appeal on

**DT Dobie Tanzania Ltd vs. Fantom Modern Transport (1995) Ltd** Civil Application No. 131 of 2001. In this case the similar scenario occurred when document was filed without being signed and had no date. The court was bitter on breaching the rule and making error which can be corrected.

Mr. Seka while justifies costs for his objection submitted that the respondent is a civil servant residing at Dar Es Salaam and his Advocate is from Dar Es Salaam who has been representing respondent since the matter was in the lower court, both of them had to travel to Musoma for the matter. He cemented his prayer by citing the case of **Nasra Said vs. KCB Tanzania Limited**, Misc. Comm. Application No. 190 of 2016 reported in Tanzilii [2016 TZHC COMDD 24] and **Novoneca Construction Company Limited & another vs. NBC Limited** Comm. Case 8 of 2015 reported in Tanzilii [2016 TZHC COMMDD no. 28]. After exhausting the first ground Mr. Seka decided to drop the second ground and finalized his submission.

Protesting the objection, Mr. Nyamwelo submitted that the petition before this court is signed by the appellant himself and it's a new practice that the document filed in electronic means and it is the duty of the court to print for other steps to follow. He further submitted that the document which they serve to the respondent is faint but at the second page it is written drawn

by name and there is a stamp. He informed the court that if the document is faint then it cannot be the mistake of the appellant neither his advocate as it was printed by the court and the court which printed satisfy that the document is properly filed. He argues this court to verify the signing by searching for original document or calling the copy admitted by the District Court to inspect and verify the same. Whereby by doing so the Preliminary Objection lacks locus to be Preliminary Objection, he amplified.

While influencing this court to agree by his assertion Mr. Nyamwelo cited the case of **Alphonse Buhatwa vs. Juliet Roda Alphonse** Civil Reference No. 9/01/2016 CAT at Dar Es Salaam (unreported) which provides conditions for a preliminary point of objection to succeed. First the point of law raised must be pleaded or must arise as a clear implication from the proceedings. Secondly, it must be a pure point of law which does not require close examination or scrutiny of the affidavit or counter affidavits. Thirdly is that the determination of such point of law must not depend on court exercise its discretion.

He pointed out that the problem is on the second condition, that the submission by the counsel of the respondent is clear that it will need the court to investigate and satisfy itself in the District Court whether it is signed

or not, which is not intended by any point of law as the same must be clear on face of record.

Mr. Nyamwelo discussed provisions of law as cited by Counsel for respondent that S. 34 (1) about notice to the advocate the court notifying the advocate of the availability of the appeal so that other party can be notified and argued that there is no prejudice in this section as the counsel appeared in court. It was his argument that the Overriding Objective Principle should not be considered as there is no negligence on the side of the appellant.

Mr. Nyamwelo said the case of **DT Dobie Tanzania Ltd vs. Fantom Modern Transport** (supra) is distinguishable because in the instant case appellant complied with the requirement as the petition is signed and dated. Arguing on costs, it was his submission that the appeal is correctly before this court and Preliminary Objection lack some condition to stand and he prayed the same to be overruled and that he don't pray for the costs as court practice. He elaborated further that the court is not supposed to impose costs to some category of cases includes probate, family and labour. While distinguishing the cited cases in costs he said all cases cited by the counsel for respondent are commercial cases while the case at hand do not fall under commercial category, it is on probate which is exempted from costing. He



strengthens his point by citing the case of **Swabaha Mohamed Shosi vs. Sabulia Mohamed Shosi**, Civil appeal No. 98 of 2018 at the last page indicating that, because the appeal was concerning family, then, the court ordered no costs. He prayed the objection be overruled without costs.

In rejoinder Mr. Seka agree with the rules as provided in the case of **Alphonse Buhatwa (supra)** and confirm that the principle has been amplified on the sense that Preliminary Objection must arise as clear implication from the proceedings. He argued that because the proceedings are before this court, then, it does not require the court to visit the system and that the explanation that the petition is faint, he said, is submission before the bar and that the second condition on the cited case need not be applied.

On the issue of costs, he said before this court is the issue of negligence on the part of the advocate and has nothing to do with probate and finalized by prayed the appeal be dismissed and appellant be directed to file fresh appeal. As stated above, the respondent had raised a preliminary objection challenging the competence of the petition, the objection had to be determined first. I have duly considered the arguments made by the learned counsel for the parties. It is an indisputable fact that in this appeal, the

appellant is appealing against the whole decision of the trial court which denied extension of time to the appellant on the ground that the appellant failed to account for each day of delay.

In the preliminary objection, the subject matter of this ruling, the respondent's counsel contends that the petition is incompetent because appellant or his advocate failed to sign it. The counsel for appellant's contention is that he signed the petition and stamp his seal then it was filed online. The argument by the appellant's counsel is that, the preliminary objection is incompetent because it has no merit as the verification of signature in the petition will need investigation in the system, the process which makes the preliminary objection non meritorious.

I have subjected to the contending arguments of the trained minds for both parties to proper scrutiny. Having so done, now, the issue for determination by this court is whether the Preliminary objection itself is meritorious. Before determine this preliminary objection let me visit provisions of law which requires the document to be signed by appellant or an advocate. Section 34 of Cap 11 provides as follows;

*'34. -(1) Save where an appeal is summarily rejected by the High Court and subject to any rules of court relating to substituted service, a court*



*to which an appeal lies under this Part shall cause notice of the time and place at which the appeal will be heard to be given-*

*(a) .....*

*(b) in all proceedings of a criminal nature in the High Court, or in any such proceedings in the district court in which he is an appellant or has serve notice that he wishes to be heard, to the Director of Public Prosecutions: Provided that, no such notice need be given-*

*(i) .....*

*(ii) .....*

*(iii) to any advocate unless the **petition of appeal is signed by the advocate or the appellate** court is otherwise informed that he is instructed to appear at the hearing; or*

*(iv) .....'*

From the above excerpt, there is no doubt that the petition needs to be signed before filling it. After verified the requirement of signing of the same, now the duty of this court is to determine whether the Preliminary Objection meet conditions set by list of renowned decisions of various courts of law to mention few are the case of **Mukisa Biscut Manufacturing Company LTD vs West End Distributors LTD** [1969] E. A 696, **Hezron Nyachiya vs Tanzania Union of Industrial and Commercial Workers and Others**, Civil Application No. 70 of 2001 (unreported), **Tanzania Telecommunications CO. LTD vs Vedasto Ngashwa and Four others**,

Civil Application No. 60 of 2009 (unreported), **Ayubu Bendera and 10 Others vs AICC**, Civil Application No. 9 of 2014 (un reported), and **Alphonse Muhatwa vs Juliet Roda Alphonse** (supra).

The latter case expounded the decision in **Tanzania Telecommunication case** (supra) to the effect that preliminary point of objection must meet three conditions as rightly presented by Mr. Nyamwelo. Among those listed, the second condition, as argued by both counsel, that objection must be on a pure point of law and on face of record which does not require close examination or scrutiny of the document in systems or visiting District court registry. See **Alphonse Muhatwa vs Juliet Roda Alphonse** (supra). In the case at hand Mr. Seka submitted that so far as the pleadings are before this court then it will not require close scrutiny neither by visiting any system as it is clear that the document has no signature.

There is no doubt that the petition was admitted by the District Court and was printed from the system. On face of it, the whole document is faint serve for the, at this juncture, I join hand with the counsel for the appellant that the problem was with the court printing mechanism and not the fault of the counsel for the appellant. In order for this court to verify the status of the petition whether it is signed and the signature is faint tracing the original

petition is inevitable. The action of the original document disqualifies the preliminary objection as was argued in the Case of **Aphonc Buhatwa vs Juliet Roda Alphonc** (supra). The fact that the petition bears a seal of Advocate Nyamwelo and the document is faint, this court is satisfied that the petition was signed.

On the basis of the position stated above, I find the Preliminary Objection as raised by the counsel for appellant is non meritorious. I do not find any pressing need to consider the issue of costs as presented and argued by counsel for each party due to current findings of this court. In the event, I ordered the application as filed by the appellant be heard on merit.

Dated at **MUSOMA** this 15 day of December, 2022.



  
**M. L. KOMBA**

**Judge**

**15<sup>th</sup> December, 2022**

Ruling delivered today 15<sup>th</sup> December, 2022 before Mr. Nyamwelo for appellant and Mr. Joseph Nyakutonya relative of Baraka Phares Nyakutonya the respondent.

  
**M. L. KOMBA**

**Judge**

**15<sup>th</sup> December, 2022**