

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
TEMEKE SUB-REGISTRY
(ONE STOP JUDICIAL CENTRE)
AT TEMEKE**

PC CIVIL APPEAL NO. 2 OF 2021

*(Appeal from the decision of the District Court of Kinondoni at
Kinondoni in Misc. Civil Application No. 75 of 2021, Originated from Kinondoni
Primary Court in Probate Cause No. 474 of 2008)*

AMIRI RAMADHANI.....APPELLANT

VERSUS

MTEMBEZI RAMADHANI AMIRI.....RESPONDENT

JUDGMENT

Date of last order: - 29/08/2022
Date of judgment: - 13/12/2022

OPIYO, J.

Aggrieved by the decision of the District Court of Kinondoni at Kinondoni in Misc. Civil Application No. 75 of 2021 delivered by E. A Mwakalinga SRM on 07th September 2021, the appellant appealed to this court on the following grounds:-

1. That, the learned Resident Magistrate of Kinondoni District Court erred in law and fact in failing to consider illegalities contained in the "uamuzi" of Kinondoni Primary Court as the basis for extension of time to appeal out of time.



2. That, the learned Resident Magistrate of Kinondoni District Court erred in law and fact when it ignored the principles laid down in the decision of the Court of Appeal of Tanzania in the case of The Registered Trustees of Kanisa la Pentekoste v Lamson Kizakwe & 4 Others, Civil Application No. 191/2019, Court of Appeal at Mbeya (unreported)
3. That, the learned Resident Magistrate of Kinondoni District Court erred in law and fact in dismissing the application for extension of time to appeal out of time while the appellant had adduced sufficient causes for extension of time.
4. That, the learned Resident Magistrate of Kinondoni District Court erred in law and fact as she exercised her discretionary power to extend the time to appeal injudiciously, consequently the appellant was denied his constitutional right of appeal to the District Court.
5. That, the decision of Kinondoni District Court is faulty and wrong at law.
6. That, the learned trial magistrate misdirected himself in addressing the issues which were not before her.

Wherefore, the appellant prays for the appeal to be allowed, the decision of Kinondoni District Court to be quashed and orders thereto be set aside, the appellant be granted an extension of time to appeal out of



time, costs to be provided for and any other relief deems fit to be awarded by this court.

In consensus on 13th July 2022, the counsels representing the parties herein agreed to dispose of the matter by the way of written submission of which both parties filed their submission timely.

Arguing for the appellant, Prof. Cyriacus Binamungu prayed to argue grounds 3 and four together. He stated that the District Court observed correctly on page 5 of the ruling that section 20(4) of the Magistrates Court Act, Cap 11, R.E 2002(*sic*) allows extension of time to file an appeal out of time upon leave of the court, but the court did not consider at all the content of paragraphs 9, 10, 11, 12, 13 of the affidavits in support of chamber summons. In those paragraphs the appellant had indicated clearly that he was aggrieved by the decision of the primary court and intended to appeal and he started making follow up on the copy of the ruling which was not availed to him until 6th April 2021. That is 39 days after the judgment was delivered. The delay in filing the appeal due to the waiting for the copy of the judgment is a good cause for an extension of time and cited the case **of Fadhil Mwandete v Jenifa Pitles Kela, HC at Mbeya (unreported)**. But, in the case at hand, the learned Magistrate did not in any way discuss the reasons advanced in the affidavit; instead, she reproduced case laws.

He continued to state that the intended appeal cannot be filled to the higher court in the absence of the copy of the decision being attached this is especially when legal services are to be sought. He cited the case



of cited the case of **Petro Robert Myavilwa v Myavilwa & Erika Myavilwa, Probate Appeal No. 1 of 2019 HCT at Mbeya** to fortify his argument. Therefore, although the District court held that it is not a legal requirement to attach the copy and although the law did not require the appellant to attach the copy, in order to lodge a sound appeal it is necessary to obtain a copy of a decision, he contended.

The appellant's counsel also combined grounds 1 and 2 and stated that, the matter at hand involves a Primary Court revoking the appointment of administration of the estate on grounds of not adhering to the orders of the court on the manner of distribution of the estate. That, this is contrary to the law as courts are not allowed to interfere with the distribution of the deceased estate and this amounts to illegality which the appellants are complaining about and the trial District Magistrate failed to consider this ground as well.

In reply, counsel for the respondent Jerome Joseph Msemwa stated that grounds 3 and 4 of the appeal lack merits as the lower court considered properly all the contents of the affidavit in support of the chamber summons and came to a conclusion as per page 6 of the ruling dated 7th September 2021.

The appellant's contention that, the court did not consider paragraphs 9, 10, 11, 12, and 13 of the affidavit is not true as the appellant stated that he started making follow-ups of the copy of the ruling which was not availed to him until 6th April 2021 that is 30 days after delivery of the judgment. He further stated that, the decision of **Fadhil Mwandete v Jenifa Pitles Kela, HCT at Mbeya (unreported)** as cited by the



appellant does not support his position as it was in respect of matrimonial proceedings while the instant case relates to Probate issues that apply different laws. The counsel further submitted that attaching a copy of the impugned decision, decree and order is not a condition in filling appeals originating from primary courts and referred to the case of **Swabaha Mohamed Shoshi v Saburia Mohamed Shoshi, Misc. Probate Application No. 67 of 2016.**

The counsel for the respondent further submitted that, for one to obtain an extension of time he must account for each day of delay (**Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association, Civil Application No. 2 of 2010 (unreported)**). He further stipulated that in regards to paragraphs 9, 10, 11, 12, and 13 of the appellant's affidavit he was informed that in order to appeal to the District Court he must be accompanied by a copy of the judgment but he did not mention the names or ranks of Court Officers who informed him so in his affidavit as required by law (**Petro Robert Myavilwa case** (supra)).

Arguing for ground 1 and 2 the counsel submitted that, there is no illegalities in the decision of the trial court as the revocation was based on the failure of not following court orders in the distribution of properties. This ground is therefore unfounded and lack merit and there is no such issue on record that the Primary Court Magistrate interfered in the manner of distribution of the estate, he stated. One of many other reasons for the revocation is failure to finalize the probate for almost 12 years and cited the case of (**Tanzania Harbours Authority and**



Mohamed R. Mohamed, Civil Appeal No. 80 of 1999). He thus prayed for the appeal to be dismissed.

In the rejoinder the counsel for the appellant mostly emphasised that the District Court did not make the appraisal of the case based on what was pleaded. I find no need to reproduce the rest of the arguments as they have been extensively argued in submission in chief.

I had a vigilant reflection on the submissions by both parties. I have also painstakingly gone through the records at hand relating to this appeal. In this appeal 6 grounds have been raised. The appellant argued jointly the third and fourth grounds, and first and second grounds were also argued together. The appellant abandoned grounds five and six. I prefer to start with grounds one and two. In the submission in chief, the appellant stated that the Primary Court interfered with the distribution of the deceased estate and this amounts to illegality on the face of record which is one of the good causes warranting extension of time.

After perusal, I found that this ground was raised in paragraph 13 of the affidavit in support of the chamber summons for the prayer of extension of time, and a copy of the said ruling was attached and marked as Annexure AR 1. Reading the ruling on page 7 last paragraph as I quote for clarity;

*"...Mahakama hii inaona kuwa utaratibu uliokuwa ukitumika kwa mali ya awali ya marehemu ambayo aliacha yeye mwenyewe na **ndiyo mahakama tarehe 4/8/2009 ilielekeza juu ya ugawanyi wa mirathi hiyo...**"*
(emphasis is mine)

This court failed to peruse the proceedings of 4/8/2009 to see how the court directed the distribution of the properties as the trial court file was not attached. In the case of **The Principal Secretary, Ministry of Defence and National Service v Valambhia (1992) TLR 185** of which the court insisted that;

*"If the point of law at issue is illegality or otherwise of the decision being challenged, that is sufficient importance to constitute "**sufficient reason**" for extending time."*

What can be observed from above is that, there was indeed an issue of illegality raised by the appellant in his application for extension of time regarding the direction given by the Primary Court Magistrate on the distribution of the estate on 4/8/2009 which was not given a thought at all at the District Court apart from being put in the summary of parties arguments (see page 2 and three of impugned decision). That means the point was left unattended in dismissing the application. In essence looking at pages 5 and 6 of the decision, the Magistrate discussed nothing in relation to sufficiency of the grounds raised by the then applicant to warrant grant of the application. In the **Principal Secretary Ministry of Defence and National Services (supra)** also the case of **Juto Ally versus Lukas Komba & Another, Civil Application No. 487/17 of 2019 (unreported)**, it is settled that even if the applicant has not sufficiently accounted for the period of delay, the issue of alleged illegality of the decision to be impugned suffices to move me to grant her extension of time.



The contention that there is a point of law involved in the decision sought to be impugned on appeal need not be established in the application for extension of time. It only suffices for the applicant to indicate such a contention in the intended grounds of appeal, the duty to determine the alleged illegality lies with the court in the course of considering the appeal (see **Tropical Air (Tz) Ltd versus Godson Eliona Moshi, Civil Application No. 9 of 2017 and Lyamuya Construction Company Ltd (supra)**).

From the perusal of the records, I noted Prof. Binamungu's concern that, the trial court went beyond its powers in directing the manner of distribution of the deceased estate. He contends that this amounts to illegality on the face of records requiring consideration by the higher court. Such desire could not be achieved because the action (appeal) for its rectification was already time barred, needing extension of time to file out of time. He discharged his obligation by putting it forward and explaining it. Therefore, the District Court was not supposed to dismiss the appellant's application without a word on the alleged illegality apparent on the face of the impugned decision that was put before it. Since it has been held that illegality contention is in itself sufficient to extend the time, it was prudent to give it a thorough consideration. It was therefore, a wrong to turn a blind eye on the same by the District court in determining the application before it. In my view, it is in the interest of justice the real dispute between the parties be settled and it can only be done through hearing the intended appeal to have the point of illegality be considered. Having so said, the two grounds of appeal are found to have merit and they are hereby allowed.



I find determination of the two grounds is enough to dispose of this appeal, hence I won't trouble myself disposing remaining grounds. In the event, I quash and set aside the decision and orders of the Kinondoni District court in Misc. Civil Application No. 75/2021. The applicant has to file his appeal within fourteen days (14) from the date of this judgment. Each party shall bear its own costs due to the relationship the parties.

It is so ordered.



A handwritten signature in blue ink, appearing to be "M. P. Opiyo", is written above a horizontal line.

M. P. OPIYO,

JUDGE

13/12/2022