

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

**IN THE DISTRICT REGISTRY OF MUSOMA**

**AT MUSOMA**

**CIVIL APPEAL No. 40 OF 2021**

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

*Versus*

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

*(Arising from the District Court of Musoma at Musoma in Misc. Civil Application No. 20 of 2021 & Original from Musoma Urban Primary Court in Civil Case No. 6 of 2022)*

**JUDGMENT**

*27 & 27 April 2022*

**Mtulya, F.H., J:**

The appreciation of section 3A & 3B of the **Civil Procedure Code [Cap.33 R.E.2019]** (the Code) is displayed this morning before this court by learned counsels, Mr. Mussa Nyamwelo who appeared for Agripa Fares Nyakutonya (the appellant) and Mr. John Seka, representing Mr. Baraka Phares Nyakutonya (the Respondent), in cherishing section 66 of the **Advocates Act [Cap.341 R.E.2019]** (the Advocates Act). The submission of Mr. Seka, as officer of this court displays it all. I will quote for purposes of clarity and appreciation of the subject.

*My Lord, having heard counsel for the appellant, Mr. Nyamwelo, and after perusing the precedent of **Swabaha***

*Mohamed Shoshi v. Saburia Mohamed Shoshi, Civil Appeal No. 98 of 2018, we see, on our side, and for interest of justice, this court to quash the decision of the district court with clear direction to the presiding magistrate to compose a judgment that captures all issues that are complained by the appellant.*

The submission registered by Mr. Nyamwelo shows a complaint on the decision of the district court of Musoma (the district court) in **Misc. Civil Application No. 20 of 2021** (the application) that captured only one issue of illegally in an application of extension of time whereas the parties in the application had registered materials which displayed three (3) reasons of delay namely: first, illegally; second, technical delay; and finally time spent by the appellant in searching learned counsel. According to Mr. Nyamwelo, the other two (2) reasons on technical delay and delay caused by the applicant in eyeing for a proper and qualified learned counsel were not considered and determined, and no reasons were registered to depict the decline on part of the learned magistrate in the district court.

On the other hand, the decision of the Court of Appeal in **Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi** (Supra), at page 12 of the judgment stated that:

*It is also settled position of the law that, a matter not decided by the High Court or subordinate court exercising extended jurisdiction cannot be decided by this court.*

In giving reasoning of the same, the superior court of the land stated at page 13 & 14 of the judgment that:

*It is clear that the jurisdiction of this court on appeal is to consider and examine matters that have been considered and decided upon by the High Court and subordinate courts with extended jurisdiction.*

Following this reasoning, Mr. Nyamwelo opined that the appeal that was filed in this court left some issues undetermined by the district court and prayed this court to quash decision of the district court in the application and direct the district court to compose fresh and proper judgment that will comprise all issues, as directed by the Court of Appeal. The submission and prayer of Mr. Nyamwelo were received well by learned counsel Mr. Seka hence supported the appeal.

I perused the record and decision of the district court in the application and found that the appellant in the application had registered three (3) reasons of delay in the application to persuade learned magistrate of the district court to decide in his favour. However, the learned magistrate decided to determine only one reason

of illegality in the application and declined to consider two other reasons of technical delay and searching of an advocate. It is unfortunate that the decline on determination of the two reasons was not supported by any statement.

It is fortunate that the remedies under such circumstances are explained in the decision of ***Swabaha Mohamed Shoshi v. Saburia Mohamed Shoshi*** (supra) at page 14 of the judgment, that:

*In the premises, we are constructed to allow the appeal. Consequently quash the Ruling as set aside the order of the High Court in respect of **Misc. Probate Application No. 110 of 2017**. We order that the record be remitted to the High Court before the same judge for composition of a fresh decision on all matters submitted before him.*

This stand of the Court had already received support in a bundle of precedent of its own (see: **Alnoor Sharif Jamal v. Bahadur Ebrahim Shamji**, Civil Appeal No. 25 of 2006 and **Celestine Maagi v. Tanzania Elimu Supplies (TES) & Another**, Civil Revision No. 2 of 2014). Having said, so and considering the need of justice to the parties, and noting this court would love to determine issues which have been resolved by districts courts, I have decided to follow the course of the Court of Appeal and hereby allow the appeal and quash the Ruling, set aside

order of the district court in the application and further direct the district court, under the same learned magistrate to compose a fresh and proper Ruling that will comprise all registered reasons of delay for consideration of enlargement of time. The consideration and determination of the issues should commence immediately and a fresh Ruling be delivered within three (3) months from the date of this judgment. Noting this is a probate cause and the contesting parties are relatives, I have decided to order no costs. Each party shall bear its costs.

Ordered accordingly.



F.H. Mtulya

**Judge**

27.04.2022

This judgment was delivered in chambers under the seal of this court in the presence of Mr. Mussa Nyamwelo for the appellant and Mr. John Seka for the respondent.



F.H. Mtulya

**Judge**

27.04.2022