

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF MUSOMA
AT MUSOMA

PC. PROBATE APPEAL No. 10 OF 2022

*(Arising From the District Court of Musoma at Musoma in Misc.
Application No. 29 of 2020 & Originating from Musoma Urban Primary
Court in Objection Proceedings of Probate Cause No. 124 of 2010)*

SAASABA MALEMBO MATAGE APPELLANT

Versus

ELIAS JOSHUA MGANDA RESPONDENT

JUDGMENT

18.05.2022 & 18.05.2022

F.H. Mtulya, J.:

On 10th November 2020, the **District Court of Musoma at Musoma** (the district court) in **Misc. Application No. 29 of 2020** (the application) delivered a Ruling on three (3) points of preliminary objection (the objection) registered by learned counsel Mr. Emmanuel Baraka for Mr. Elias Joshua Mganda (the respondent) to protest the jurisdiction of the district court. The three (3) points were, briefly: first, the affidavit is defective for containing arguments and extraneous; second, the application abuse court process; and finally, the district court is *functus officio*.

In order to argue the points of law, both parties invited legal services in Mr. Werema for the respondent and Mr. Ostack Mligo for Mr. Saasaba Malembo Matage (the appellant) to register materials for and against the objection in written submissions. After full hearing of the objection, the district court determined to its finality

only one (1) point of objection on a complaint of the affidavit. At page 4 of the Ruling, the district court stated that:

*Having gone through the rival submissions of the learned counsels, I am alive to the principles which have been given by the courts of records on account of extension of time within which one may appeal out of time. Refer the case of the **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia [1992] TLR 182** ...in the present application, the applicant did not utter a word through his affidavit, even in a single paragraph the reason for being late in filing the appeal....Thus, I am with agreement with the respondent counsel that the affidavit of the applicant contains extraneous matters which do not constitute the case (lateness).*

This statement in the Ruling of the district court was spotted and captured by learned counsel Mr. Mligo, who grabbed it and dashed to this court complaining that the learned magistrate had determined an application for enlargement of time to file an appeal out of time, which was not before him and no any materials were registered to assist the district court in arriving at justice of the parties in the application.

According to Mr. Mligo the points related to the objection were not determined and the district court jumped on its own motion into

the merit of the case and there were no materials registered for the main case hence the parties did not cherish the right to be heard. Finally, Mr. Mligo prayed the decision of the district court be quashed in favour of proper application of the law in drafting rulings. The submission of Mr. Mligo was received well by learned counsel Mr. Werema, who acted as officer of this court, and supported the move. In his opinion, Mr. Werema stated that in such cases, the appropriate course is for this court to quash the decision of the district court and order the learned magistrate to compose a fresh and proper Ruling that will contain all three (3) points of law.

I have gone through the record of the present appeal and found that learned counsels of the parties in the application had registered written submissions in favour and against the three (3) points of the objection, but learned magistrate in the application declined to deal and determine all the three (3) points of law. The points were well mentioned by the learned magistrate at page 1, 2 and 3 of the decision as *obiter dicta* without any holding or *ratio decidendi*, save for the first point.

It is unfortunate, the Ruling changed its course at page 4 of the decision in inviting the issue of enlargement of time with its associated reasoning and support of the Court of Appeal decision in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra). I understand the right to be heard is

not only a human right issue, but also a constitutional right enshrined in article 13 (6) (a) of the **Constitution of the United Republic of Tanzania** [Cap. 2 R.E. 2002] and well celebrated in precedents of the Court of Appeal in **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251 and **Judge In Charge, High Court at Arusha & The Attorney General v. Nin Munuo Ng'uni** [2004] TLR 44.

This court will not close its eyes when it sees vivid breach of the right to be heard and resolving of registered issues brought before our courts. I will therefore follow the remedies reserved by this court and Court of Appeal in cases like the present one, without any further interpolations (see: **Darius Pupun Saasita v. Serikali ya Kijiji Kurukerege**, Misc. Land Appeal Case No. 6 of 2022; **Agripa Fares Nyakutonya v. Baraka Phares Nyakutonya**, Civil Appeal No. 40 of 2021; **Swabaha Mohamed Shoshi v. Saburia Mohamedi Shoshi**, Civil Appeal No. 98 of 2018; **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 without delay to the parties, I have decided to allow the appeal, quash the Ruling 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 contain all three (3) points of the objection and escape determination of the application on merit. The composition of fresh and proper Ruling should commence immediately and without any delay and complete within thirty (30) days from the date of this judgment. Noting this is a probate dispute and the contesting parties allege that they are relatives from the same clan and understanding that Mr. Werema acted very gentle in cherishing section 66 of the **Advocates Act** [Cap. 341 R.E 2019], I order no cost. Each party shall bear its own costs.

Ordered accordingly.





F. H. Mtulya

Judge

18.05.2022

This judgment was delivered in chambers under the seal of this court in the presence of the appellant, Mr. Saasaba Malebo Matage and his learned counsel Mr. Ostack Mligo and in the presence of the respondent, Mr. Elias Joshua Mganda and his learned counsel, Mr. Emmanuel Baraka Werema.


F.H. Mtulya

Judge

18.05.2022