

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL APPEAL NO. 224 OF 2019

*(Originating from Misc. Civil Application No. 70 of 2016,
Ilala District Court)*

LIKULILE MUSA ALLY.....APPELLANT

VERSUS

MANENO KIZWEZWE.....1ST RESPONDENT
RAMADHANI RASHID.....2ND RESPONDENT

JUDGMENT

5/11/2021 & 21/1/2022

E. B. LUVANDA, J.

This is a second appeal following the decision of the first appellate court which dismissed the appellant's application for enlargement of time to appeal against the decision of the primary court. For appreciation, it is desirable to recap some salient facts and events before the two courts below for easy referencing.

The first respondent mentioned above was granted with the letters of administration of the estate of the late Khadija Mussa Sama, vide court order (ruling) of the primary court dated 27/10/2015, following concession

of all heirs, the appellant being inclusive. The trial court also made an order for the administrator to collect all estate of the deceased comprising five houses situated at Ilala Quarter Mchikichini, Tandale Kinondoni, Kigogo Kinondoni, Kibaha Pwani, Buguruni Ilala and divide them to heirs (children of the deceased). Heirs of the deceased includes: Likulile Mussa Ally (appellant herein), Yusufu Ally Likulile, Kibiriti Ally Likulile, Ngayachi Ally Likulile, Ramadhani Rashid Chandugu, Hussein Rashid Chandugu (deceased) and Pili Rashid Chandugu (deceased), the latter is the mother of the administrator who is the first respondent herein. Initially the appellant who had testified as PW3 at the primary court, alleged that the decedent died testate, a fact which was supported by his uncle one Nassoro Alfani Sama (PW5). PW5 tendered copy of a will and an affidavit purporting to have been made by the deceased and handed over to him (PW5). But when the administrator (first respondent) was testifying as PW1, he disowned and refuted a claim that the deceased had left a will. This fact was not cross examined by the appellant (PW3), including a fact by Ramadhani Rashid Chaungu (PW4) that at the time it is alleged that the will was made, the deceased had lost memory due to aging (old and senile), and sometimes when they (PW4) visited her she could not recognize them, instead she could undress and refer them as her husband

where they were obliged to run away. A fact that the deceased was undressing clothes before her sons presuming them to be her husband was also cross examined by PW4 to PW5 who responded that he don't know if her sister had run mental and confused to the extent of undressing before her own sons and calling them husband. PW5 stated that he is not aware that for five days the deceased was walking out nakedly. When PW5 was cross examined by the court assessors said he did not attend or participate sickness, burial or forty of the deceased. PW5 when was cross examined by Ramadhani Rashidi Chandugu (PW4) as to when the deceased handed over the said will to him (PW5), he did not have any recollection of a particular year. PW5 on cross examination by PW4 said he was not there when the deceased made the purported will. There was also a fact by Happy Hussein Ally Mbuje (PW6) who is the daughter of the appellant, stated that the latter had brought to PW6 a will and asked her to append a signature. When PW4 was cross examined by the appellant, stated that the deceased had disappeared for five days and when she came back she was unresponsive, lost speech and was unable to speak.

In view of the foregoing, the primary court ruled that the alleged will and affidavit (which were only supported by the appellant alone among all children of the deceased), was a nullity. It is to be noted that the decision

of the primary court was handed down on 27/10/2015. After elapse of four months from when the decision of primary court was pronounced, on 15/3/2016 the appellant filed an application for extension of time at the district court against the decision of primary court dated 27/10/2015, pleading that he applied for copies of judgment which he obtained after time for appeal had elapsed. Another ground staged by the appellant is that at the time he obtained a copy of judgment, his lawyer one Barnaba Luguwa was on leave and soon thereafter was engaged on BRN session at the High Court Land Division. It is to be noted that, in the affidavit in support of chamber application the appellant did not state as to when he applied for a copy of the said judgment, neither stated as to when the same was exactly supplied and handed over to him. After deliberating on the appellant's grounds, the first appellate court held that failure to be supplied with a copy of judgment is no (sic, not) sufficient ground for enlargement of time as the copy of judgment is not supposed to be annexed in the petition of appeal from primary to the district court. The district court went on to rule that the appellant was served with a copy on 8/2/2016 and filed the application on 11/3/2016, instead of filing it immediately after obtaining a copy of judgment. Further the district court held that failure to adhere to the deceased will is not a ground for

extension of time rather ground of appeal. The decision of the district court was delivered on 21/9/2017. Thereafter the appellant preferred Misc. Civil Application No. 141 of 2018 before this Court, seeking for enlargement of time to enable him file an appeal against the decision of the district court. The discretion of this Court was tilted in his favour, where the appellant was allowed to present his appeal against the decision of the district court within fourteen days.

The appellant complied with an order, where in the memorandum of appeal the appellant grounded that: one, the trial primary court magistrate erred in law and fact to nullify the validity of the will of the late Khadija Mussa Sama; two, the trial magistrate erred in law and fact in not considering the fact that the said beneficiaries of the will are staying in their respective properties according to the will; three, the trial primary court magistrate erred in law and fact to refuse to acknowledge the *hati ya kiapo* dated 18/8/2006; four, the trial primary court magistrate erred in law and fact to allow the administrator of the estate of the late Khadija Mussa Sama to distribute the properties of the late Khadija Mussa Sama contrary to the will; five, the trial primary court magistrate erred in law and fact to nullify the will without the presence of the witness who witnessed the will.

Again the appellant impleaded the second respondent without any probable cause or action, as the alleged Ramadhani Rashid is not an administrator of the estate of the late Khadija Mussa Sama.

The appeal is dismissed with costs.



E.B. Luvanda
Judge
19/01/2022

From the above, the appellant's appeal is out of context. This is because the grounds of appeal are hinged on the merit of the probate, while the decision of the district court where this appeal arise from was on the issue of extension of time. As such the appellant ought to crafts his appeal and grounds thereof challenging the verdict of the district court for refusal to extend time to enable him to appeal to the district court on the merit of the probate. As much the district court did not sit to decide on the merit of the probate, the appellant appeal is misplaced, misconceived and therefore untenable before this Court. This is because this Court does not have a concurrent jurisdiction with the district court to determine right away appeal from primary courts unlike in matrimonial proceedings.

Therefore, even the submissions in support of and against the appeal, are also invalid.

The appellant is to blame himself for being inaction and sedative on umpteenth which border abuse of court process, given the complaint by other heirs that the appellant is amongst who are benefitting a lion share from the undistributed estate of the deceased through collection of rent from tenants in houses situated on prime areas.