

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PC PROBATE CIVIL APPEAL NO. 12 OF 2021

*(Arising from Probate Appeal No. 01 of 2021 of Moshi District Court at Moshi,
Originating from Probate No. 78/2019 of Moshi Urban Primary Court.)*

BEATRICE DAMAS SHIRIMA..... 1ST APPELLANT

TWALIB DAMAS ROBERT SUMNI.....2ND APPELLANT

VERSUS

DEVOTHA DAMAS SHIRIMA.....1ST RESPONDENT

EMMANUEL DAMAS SHIRIMA.....2ND RESPONDENT

RULING

10/02/2022 & 15/3/2022

SIMFUKWE, J.

Mr. Ralph Njau learned counsel for the respondents herein raised three preliminary objections on point of law:

1. That, the Appeal is improperly before the Court.
2. That the appeal is hopelessly out of time.
3. That the appeal is incompetent as no Decree has been attached therein.



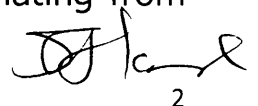
The Preliminary objections were argued by way of written submissions whereby the respondents were represented by Mr. Ralph Njau learned counsel, while the appellants were unrepresented.

On the first preliminary objection, **that the Appeal is improperly before the Court;** Mr. Ralph Njau submitted that their objection centres on the form the appeal has taken. He elaborated that this appeal originates from Moshi Urban Primary Court – Probate No. 78/2019. The governing law is therefore the **Magistrates' Courts Act** [Cap 11 as revised], Part III of the Act which provides for various matters including appeals from Primary Courts. Sub – Title (c) of Part III deals with Appellate and Revisional Jurisdiction of the High Court in relation to matters originating from Primary Courts. **Section 25 (3)** thereto is specific, that:

"Every appeal to the High Court shall be by way of Petition....."

That, it is a legal requirement that mandatorily an appeal takes a format of a Petition and not otherwise. The learned counsel averred that the present appeal is incompetent as far as the format thereof has not been complied with legal requirements. That, the appeal is titled Memorandum of Appeal, thus this court is not competent to proceed with an appeal which has failed to meet a condition precedent upon its institution. For that reason, the learned counsel prayed that the appeal should be struck out with costs.

On the second preliminary objection, that the appeal is hopelessly out of time; the learned counsel for the respondent submitted that, time limit for instituting an appeal before the High Court in matters originating from



Primary Courts is 30 days pursuant to **section 25 (1) (b) of the Magistrates Courts Act**. He stated further that, judgment in Probate Appeal No. 1/2021 of the District Court of Moshi was delivered on 20/05/2021. The instant appeal was filed on 16/7/2021 beyond the time limit set by law. In the circumstances, the learned counsel was of settled view that the appeal is not competently before the Court and that the same ought to be struck out with costs.

The third preliminary objection was dropped, thus the same was not argued by the learned counsel for the respondent.

In their reply opposing the preliminary objections raised, on the first objection that the appeal is improperly before the court, the appellants submitted inter alia that the court was improperly moved by the respondents' counsel by not citing properly the provision of the law which the court derives power to determine this appeal. They pointed out that, the citation of the law cited by the respondents is confusing by not citing it properly. The appellants were of the opinion that non citation of specific substantive provisions of the law renders the whole submission incompetent as the court cannot derive jurisdiction from wrong citation of the law to determine the application. They referred to the case of **Karim & Co. Ltd V. Africa Import & Cooperation Ltd [1960] E.A 396**, in which the Court said that:

"The whole of the application has therefore been filed under the wrong provision of the law.....it has been stated times without numbers that wrong citation or non-citation of the law from which the court derives the power to do what is requested is fatal to the application."



Opposing the first objection on their second point, the appellants stated that they did not understand the court process in filing an appeal. They contended that even though the appeal was drafted by the lawyer but it was filed by the appellants who certainly are laypersons who could not understand the procedures of the court in filing an appeal. They casted the blame on court officials that it was their duty to instruct them the court procedures. To cement their argument, they cited the case of **Hilda John vs Stanley Mtaza [1964] HCD 253** at page 90 where it was held that:

"If a party has no assistance from counsel in bringing an action which would be for more likely to succeed, then he should be advised on the procedure to assert his right by the court."

It was submitted further by the appellants that these are more matters of procedure which are not supposed to be relied upon by the court and deny justice to an aggrieved party. They reminded the respondents and their learned counsel the decision in the case of **Ramadhani Nyoni Vs. M/S Haule and Company Advocates [1996] TLR 71** where it was held that:

"Where a layman unaware of the process of justice tries to get relief before the Courts, procedure rules should not be used to defeat justice."

In addition, the appellants submitted that it is trite law that procedural irregularity should not vitiate proceedings if no injustice has been occasioned. That, the respondents' written submission in support of the preliminary objection should not be accepted by the court as the same leads to thwart justice. They referred the words of **His Lordship the late**



Biron J in the case of **General Marketing Co. Ltd Vs. A.A. Shariff [1980] TLR 61** at page 65; that, *rules of proceedings are handmaids of justice and should not be used to defeat justice.*

The appellants also referred to **Article 107A (2) (e) of the Constitution of the United Republic of Tanzania of 1977, 13th Amendment**, which provides that:

"2) KATIKA KUTOA UAMUZI WA MASHAURI YA MADAI NA JINAI KWA KUZINGATIA KANUNI ZIFUATAZO YAANI:

a)

b)

c)

d)

e) KUTENDA HAKI BILA KUFUNGWA KUPITA KIASI NA MASHARTI YA KIUFUNDI YANAYOWEZA KUKWAMISHA HAKI KUTENDEKA."

On the second preliminary objection that the appeal is hopelessly out of time, it was submitted by the appellants that they requested for the copy of judgment for preparing grounds of appeal, the same was supplied to them on 18th June, 2021. Then they filed their appeal on 16th July 2021 attached with a copy of judgment showing that it was certified on 16th June 2021. That, the appeal was filed 28 days after receiving copy of judgment which is within the prescribed time under the law.

The appellants concluded by praying that the preliminary objections be struck out (sic).

After considering submissions of both parties, the issue is whether the raised preliminary objections have merit.



Starting with the first preliminary objection which is to the effect that the heading of the appeal is titled "**MEMORANDUM OF APPEAL**" instead of "**PETITION OF APPEAL,**" despite the fact that **section 25 (3) of the Magistrates' Courts Act** is couched in mandatory terms, this court is of considered opinion that the anomaly does not go the root of the case and the same does not occasion any injustice to any of the parties. In the case of **NJAKE ENTERPRISES LIMITED Versus BLUE ROCK LIMITED AND ANOTHER, Civil Appeal No. 69 of 2017**, at page 11, it was held that:

*"This principle is now enshrined in the Act. **It enjoins the court to do away with legal technicalities and decide cases justly.....** Also, the overriding objective principle cannot be applied blindly on the mandatory provision of the procedural law which goes to the very foundation of the case." Emphasis added*

In the instant matter, I am of settled view that as already stated herein above, the error on the heading of the appeal does not occasion any injustice in this case. The same fits to be cured under the Overriding objective principle.

Concerning the second objection that **the appeal is hopelessly out of time**, the appellants have conceded that the appeal was filed out of time on the reason of late supply of copy of judgment of the impugned decision of the district court. With due respect to the appellants, despite the fact that they are laypersons, the said reason for filing their appeal out of time, should have been stated in their application for leave to file their appeal out of time. Stating the reason for filing the appeal out of time in the course of arguing a preliminary objection that the appeal is hopelessly out



of time is grossly misplaced. The appellants should have filed an application seeking extension of time to file their appeal. I subscribe to the Court of Appeal decision in the case of **Habi Said v. Joha Salum, Civil Application No. 525/11 of 2017** at Tabora, at page 7 2nd paragraph, 7th line, in which it was held that:

*"Secondly, we are certain, if anything, **worthiness of the reasons for the delay in lodging an appeal advanced by the respondent deserved a consideration by the Court in an application for extension of time to lodge an appeal.** This is not the right forum. They are, to say the least, irrelevant in the determination of the application before us."* Emphasis added

Thus, I find the second preliminary objection has merit. The same is hereby upheld accordingly.

In the event, this appeal is found to be incompetent before the court for being filed out of time. The same is strike out. Appellants should file an application for extension of time to file their appeal. This being a probate case and having in mind the fact that parties are relatives, no order as to costs.

It is so ordered.

Delivered and dated at Moshi this 15th day of March, 2022.



A handwritten signature in black ink, appearing to read "S. H. Simfukwe".

S. H. SIMFUKWE

JUDGE

15/3/2022