

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 91 OF 2021

(C/F PC Civil Application No. 3 of 2021, at the High Court of Tanzania, Misc Civil Application No.06 of 2020, at the District Court of Karatu , Original Probate and Administration cause No. 17 of 2016 at Karatu Primary Court.)

THERESIA NEMES LASWAIAPPLICANT

VERSUS

GRACE JOSEPH SWAI.....RESPONDENT

RULING

Date of last Order:23-5-2022

Date of Ruling:25-5-2022

B.K.PHILLIP, J

The Applicant herein moved this Court under the provisions of section 5(2),(c) of the Appellate Jurisdiction Act, Cap 141 R.E 2019, praying for the following orders;

- i. That this Honourable Court be pleased to grant a certificate on points of law certifying that there are points of law worth determination by the Court of appeal of Tanzania.*
- ii. That the costs of this application to follow the event.*

iii. That any other relief that this court may deem fit to grant.

The application is supported by an affidavit sworn by the learned advocate Jofrey Alex Mollel, who appeared for the applicant in this application. The learned Advocate Kapimpiti Mgalula appeared for the respondent.

A brief background to this application is as follows; That in the year 2021, the Applicant lodged her appeal in this Court against the Ruling of the District Court of Karatu at Karatu vide PC. Civil Appeal No.3 of 2021. The aforementioned Appeal was challenging the Ruling of the District Court of Karatu, in which the respondent was granted extension of time to appeal against the decision of the Primary Court of Karatu. Upon going through the applicant's Appeal and before embarking on the determination of the merit of the Appeal, this Court (Hon. Gwae, J), raised a point of law *suo motu*, which was couched as follows;

"Whether or not the matter before the Court has contravened the provision of section 43(2) of the Magistrates' Courts Act, Cap 11, R.E 2019 which prohibits filing of appeals or applications for revision to the Court for matters arising from interlocutory orders or decisions of the District Court or a Court of a Resident Magistrates' unless such decisions or orders have the effect of finally determining the suit."

Both Advocates for the Applicant and respondent were invited to address the Court on the aforementioned point of law and at the end of the day the learned Judge held that the appeal was incompetent for contravening the provisions of section 43(2) of the Magistrates' Courts Act since the order for extension of time granted by the District Court of Karatu is not

appealable. The same does not constitute final determination the parties' rights. He struck out the appeal with costs.

The appellant being aggrieved by the aforesaid decision seeks for the certification of the following points of law so that she can appeal to the Court of Appeal of Tanzania.

- i. *Whether it was proper for the Respondent to sue the Appellant in her own names and capacity on matters related to her capacity as Administrator of estate of her deceased Father Nemes Kahumba.*
- ii. *Whether it was proper for the High court to hold that an order granting extension of time is not appealable.*
- iii. *Whether the Appellant had an opportunity of being heard before the same District Court granting extension of time on her objection against the decision granting the application for extension of time.*
- iv. *Whether it was proper for the High court to confirm the District court's decision that the court of appeal decisions in the case of Sebastian Ndaula versus Grace Rwamafa, civil application No.4 of 2014, is not applicable in subordinate courts.*
- v. *Whether there were sufficient grounds for grant of the application for extension of time.*

I ordered the application to be disposed of by way of written submission and the learned advocates filed the submissions as ordered.

Submitting for the application the learned Advocate Mollel, argued that the points of law enumerated herein above are worth the consideration of the Court Appeal. Expounding on the 1st point of law, he contended that this

Court did not consider the issue on whether it was proper for the applicant to be sued in her personal capacity whereas she is the administratrix of the deceased estate. With regard to the 2nd and 3rd points of law he submitted that this Court erred to rule out that the order of the District Court of Karatu at Karatu is not appealable. He contended that the order granting extension of time to the respondent to lodge her appeal to the District Court finally determines the rights of the parties on the application for extension of time for filing the appeal against the decision of the Primary Court.

With regard to the 4th and 5th points of law, Mr. Mollel submitted that this Court erred in law for failure to set aside the Ruling of the District Court which disregarded the legal principle laid down in the decisions of the Court of Appeal, to wit; in an application for extension of time the applicant has to account for each day of delay. Also, he contended that this Court misdirected itself, instead of making a determination on whether there were sufficient grounds for granting the extension of time sought by the respondent it based its decision on another issue, to wit; whether or not the order of the District Court granting extension of time to file appeal out of time was appealable. He beseeched this Court to grant this application.

In rebuttal, Mr. Mgalula, started his submission by pointing out that this application is incompetent because the applicant has not annexed the copy of the decision intended to be appealed to enable this Court to peruse it and make an informed decision. To cement his arguments he cited the case of **Felister Magayane Vs Mabula, Civil Application**

No. 28/08 of 2019 (unreported), in which the Court of Appeal of Tanzania upheld the decision of this Court, (Hon, Matupa ,J as he then was) in which it struck an application for certification on point of law for failure to annex the copies of the notice of appeal and the decision intended to be appealed against.

In addition to the above, Mr. Mgalula pointed out that this application is overtaken by events because the respondent has already filed her appeal in the District Court of Karatu vide Appeal No.18 of 2020 and the same has been scheduled for hearing by way of written submission. The appellant herein is aware of the said appeal as she appeared before the District Court.

With regard to the points of law alleged by the applicant, Mr. Mgalula submitted that the same are not worth to be brought to the attention of the Court of Appeal. He contended that there is no dispute that the appellant is the administratrix of the deceased estate and the failure to indicate on the title of the case that she an administratrix of the deceased estate is not fatal. He cited the case of **Felix Cornel Rite Vs Rizik Walter Bila, Civil Appeal No. 43 of 2016** (Unreported) to bolster his arguments. He went on arguing that the Ruling of this Court is not erroneous since the provision of section 43 (2) of the Magistrates' Courts Act, prohibits the filing of appeals or applications for revision to the High Court against any preliminary or interlocutory decision or order of the District Court or the Resident Magistrates' Court. This Court cannot be faulted for not interfering with the decision of the District Court of karatu which is not appealable, contended Mr. Mgalula. He was of the view that

the issues on whether there were sufficient reasons to grant the extension of time was dealt with very well at the District Court of karatu. Mr Mgalula urged this Court to dismiss this application.

Mr.Mollet did not file any rejoinder to his submission in chief.

I have taken due considerations of the submissions made by the learned advocates as well as perused the Courts' records. First of all, it is true that the applicant has not annexed to his affidavit the Copy of the decision intended to be appealed against. What has been annexed to her affidavit is the notice of appeal and a letter requesting to be supplied with a copy of the ruling.I agree with Mr. Kapimpiti that in the absence of a copy of the decision intended to be appealed against this Court cannot be able to know whether or not the points of law pointed out by the applicant are into existence and whether they are worth the consideration of the Court of appeal. Thus, the case of **Felister Magayane** (Supra) is relevant in this application.

From the foregoing, I can strike out this application for being incompetent. However, it is noteworthy that in her counter affidavit the respondent annexed the copy of the Ruling intended to be appealed against. Thus, I had opportunity to peruse the same. For the interests of justice I have decided to proceed to determine the merit of this application. I have been dismayed by the points of law stated by the applicant because all of them with the exception of the 2nd one , are not reflected in the decision intended to be appealed against. As alluded earlier in this ruling, the ruling of this Court is based solely on one legal issue which was raised by the

Court *suo motu*. Thus, I will deal with deal with the 2nd point of law only.

Having taken due consideration of the submissions made by both learned advocates, I am in agreement with Mr. Mgalula that the 2nd point of law stated by the applicant is not worth the consideration of the Court of appeal because the position of the law is very clear that no appeal on interlocutory order or any order which does not finally determine the parties' rights should be entertained by this Court, (See section 43(2) of the Magistrates' Courts Act, Cap 11, R.E 2019). The Order for extension of time to file appeal out of time did not make a final determination of the rights of the parties over their dispute. That is why as submitted by Mr. Mgalula after the order of this Court the respondent lodged her appeal at the District Court for determination of the dispute between them.

In the upshot, this application is dismissed with costs.

Dated this 25th day of May 2022



B.K.PHILLIP

JUDGE.

