

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA DISTRICT REGISTRY

AT MUSOMA

PC CIVIL APPEAL NO. 64 OF 2022

(Arising from decision of the District Court of Musoma in Misc. Civil Application No.
20/2021)

AGRIPA FARES NYAKUTONYA..... APPELLANT

VERSUS

BARAKA PHARES NYAKUTONYA..... RESPONDENT

JUDGEMENT

13 & 23 March, 2023

M. L. KOMBA, J;

In this appeal, the appellant is challenging decision of the District Court of Musoma at Musoma in Misc. Civil Application Number 20 of 2021. The appellant then applicant applied for extension of time to challenge decision of the Musoma Urban Primary Court in Probate Cause No. 61 of 2020 which appointed one **Baraka Nyakutonya** as the administrator of the estate of the **late Fares Nyambita Nyakutonya**. The appellant filed objection against his appointment for the reasons among others that, the trial court did not consider the will of deceased and for that fact the trial court lacks jurisdiction on the reason that the deceased was Christian.

The Application was dismissed regardless of it being heard twice and two ruling was delivered both indicating that the appellant failed to account for each day of delay. Appellant believes that there is illegality in the trial court decision which is the good cause for extension of time, from that, he filed this appeal with two grounds in Kiswahili language which can be summarized as;

- 1. The district court erred in law and in fact to decide that the issue of Primary Court lacking jurisdiction cannot be raised and entertained at the District Court during application for extension of time.*
- 2. The district court erred in law and in fact for failure to consider time within which the appellant was looking for an advocate to represent him in court.*

When the petition was served to the respondent, Counsel for respondent Mr. John Seka filed preliminary objection and pray for it be first entertained before hearing of an appeal. The preliminary objection was to the effect that the petition was not signed and it was overruled hence the matter was to be heard on merit.

When the case was scheduled for hearing applicant was represented by Mr. Mussa Nyamwelo and respondent enjoyed the legal service of Mr. John Seka both learned advocates.

When he was called upon to make his submission in support of the appeal Mr. Nyamwelo argued the District Magistrate erred in his judgement that the issue of registered land was not raised during trial. This was featured at page 7 of the judgement. He said what he knew that the issue of jurisdiction can be raised at any time either by parties or by court and to cement his argument he referred this court to the case of **Mwananchi Communication Limited and 2 others vs. Joshua Kajara**, Civil Appeal 126 CAT at Dar es salaam. It was his submission that if the Magistrate could concede with the issue raised he could arrive to the proper decision as the application mentioned the issue of illegality which was among the ground to grant more time to the applicant as was in the case of **Juto Ally vs. Lukas Komba and Another**, Civil Application No. 484/17 of 2019.

He further submitted that the applicant mentions this point in paragraph 10 of the affidavit and pray this court to exercise its discretion judiciously. He relied on three elements/ circumstances in which this court can interfere decision of the district court as was in the case of **Swabaha Mohamed Shosi vs. Saburia Mohamed Shosi**, Civil Appeal No. 98 of 2018 CAT at Tanga that the inferior court misdirect itself, that if he has acted in matters it should not have acted and that it has failed to take into consideration and

in so doing arrives into wrong decision. He said in our case at hand lower court misdirected itself for failure to interpret the law on which time to raise point of jurisdiction and hence cause injustice to appellant.

On the second ground he submitted that the appellant was prosecuting the civil appeal no. 02 of 2021 up to 15/05/2021 when it was struck out as it was drawn and filed by unqualified advocate and immediately the appellant started to look for the advocate with valid license and on 02 /06/ 2021 she manage to procure one and that on 03/06/2021 the advocate was reading case records and prepared the pleading which was filled on 06/06/2021 which is the Application No. 20 of 2021 and the subject of this appeal. It was his submission that he is aware of the accounting for each day of delay and provides sufficient cause. He said the circumstance of this case is different as the previous application was struck out for it being drawn by unqualified advocate then the appellant was supposed to be carefully in engaging another advocate and that they were diligent to take proper cause.

He prayed this court to consider circumstances of this case as was in the case of **Jubilee Insurance Co ltd vs. Mohamed Sameer Khan**, Civil Application No.439/01 of 2020 CAT at Dar es salaam that circumstances of the case, length of delay which according to him is not long delay, there will

be no prejudice to the other party as Primary Court had no jurisdiction and that there is illegality. He prayed for the appeal be granted by nullifying decision of the District court, he pray this without costs.

In protest of the appeal Mr. Seka started to argue **second ground of appeal** that the base of extension of time is the fact that the appellant was looking for the qualified advocate and that he manages to secure one on 02/06/2021, he said this reason has no merit as by 17/05/2021 the appellant had an advocate who has practicing license. Appellant was represented by Feran Kweka who he renewed his practicing certificate in March, 2021 and therefore it was his submission that the argument that appellant had no qualified advocate and she was looking for one is baseless and there is no explanation in affidavit why appellant decided to look for another advocate.

The case of Jubilee Insurance (supra) he said it make a base that even a single day should be counted for and that delay from 17/05/2021 was not counted and that the appellant had an advocate with valid license by the time the application was struck out and there was no record that the existing one is fired and pray this court to dismiss this ground.

On the first ground he submitted that the appellant was not given extension of time on the base of illegality, that illegality was not in the

judgement of the primary and they invite this court to read the whole judgement if it could be found the issue of registered land. At the trial court there were three issues and none of them were about registered land. Mr. Seka proceeded that from record the court will find that issue was raised during application of extension of time although he agrees that it can be raised at any time but it must be on face of record and he pray that there was no illegality and pray an appeal to be dismissed with costs as before this court is an application of extension of time which is purely a civil suit.

During rejoinder, Mr. Nyamwelo submitted that every person has a right to choose an advocate of his or her choice and that the appellant did not wanted to be represented by the advocate whom mislead her in the first instance and reiterate his submission in chief that appellant was looking for the advocate and on the first ground he insisted that the issue of jurisdiction can be raised at any stage contrary to District Court Magistrate who explained that it was not raised at the trial court.

This court is tasked to determine an appeal and in doing so I will analyse each ground separately starting with the second ground on the time spend by the appellant searching for an qualified advocate.

It is undisputed that Probate Appeal no. 02 of 2021 was struck out because it was drawn by incompetent advocate. Generally, advocates are issued with practicing certificates which are renewable every year. That certificate is considered as license and its renewal took just few hours. Therefore, it is possible for an advocate to be unqualified in the morning and latter afternoon to be qualified.

At paragraph 8 of the affidavit applicant insisted she was searching and looking for an eligible Advocate and even during oral submission counsel for the applicant insisted that the appellant was looking for qualified advocate. It is on record that by the time the judgement on the appeal was delivered, appellant advocate had valid practicing certificate and therefore he had a qualified advocate. It was not elaborated in an affidavit that appellant fired that advocate or rather there was no explanation of whatsoever why appellant decided to spend long time searching for qualified advocate while she had one. Besides, with technological advancement, knowing whether advocate is registered and is allowed to practice is done electronically in the system. This court agree that a party has a right to choose an advocate of his/her choice but while doing so the appellant was supposed to know the time was running against her and the application has

time implication. It was not proper for the appellant to spend more than 12 days to look for the qualified advocate and base on that as a ground for extension of time while he had qualified advocate, unless there was another issue which was not communicated. I find this ground is devoid of merit.

On the first ground appellant submitted that there is point of law, on jurisdiction of the primary court to entertain Probate while the deceased leave registered property. First of all I agree with the counsel for the appellant submission that issue of jurisdiction can be raised at any time just as counsel for the respondent conceded. The issue for analysis here is illegality concerning the landed property and the jurisdiction of the Primary Court. I spared time to read court records including ruling of the District court, judgement of the Primary court, grounds of extension of time and grounds of appeal together with its affidavit and other literatures. At the trial court the issue of registered land was not featured at all but it was sworn in paragraph 10 of the affidavit of the appellant that there are two registered properties.

Primary court derives its jurisdiction in the Magistrate Courts Act, [Cap 11 R. E. 2019] (the MCA). For easy of reference as I will be referring to it, I reproduce it hereunder;

- '18. (1) *A primary court shall have and exercise jurisdiction*
- (a) in all proceedings of a civil nature*
 - (i) where the law applicable is customary law or Islamic law:*
*Provided that **no primary court shall have jurisdiction in any proceedings affecting the title to or any interest in land registered under the Land Registration Act***
(Emphasis added).
 - (ii)*
 - (b) .., (c), (d)(e)*
- (2) The Chief Justice may, by order published in the Gazette, confer upon a primary court jurisdiction in the administration of deceased's estates where the law applicable to the administration or distribution of, or the succession to, the estate **is customary law** or, save as provided in subsection (1) of this section, **Islamic law** (Emphasis added).*

It is the trite law that Primary Courts have Jurisdiction in Probate matters concerning Christians where it is proved that they lived customary mode or manner of life in which situation the question of professing Christianity does not interfere with the administration of his or her estate. The reason is that by merely being a Christian does not mean one has been detached from his or her customary life, rather must be evidence to support the same. It is in record that the deceased in the case at hand regardless that he was a

Christian, his way of life did not detach him from customary life. Therefore section 18(1) (a) (i) is applicable as deceased lived customary way of life. But there is proviso to the provision, the issue of registered land.

Section 18(2) of the MCA gave powers to Chief Justice to give orders which confer Primary Court with jurisdiction in the administration of the deceased's estate where the law applicable is customary law, and indeed Chief Justice issued an order via Government Notice No. 320 of 1964 which conferred jurisdiction on primary courts **in matters of administration of estates regardless of whether the subject-matter is land registered under the Land Registration Act, provided the applicable law is customary or Islamic law.**

This court had this position in the case of **Herbert Godfrey Mwanache and Another vs. Rose Costa Mwanache**, Pc Civil Appeal No. 34 of 2022 where my learned brother A. P. Kilimi J, he analyzed as to when the customary law can be applicable to a Christian deceased whose life style was attached to customs and the jurisdiction of the Primary court in administration of the deceased estate. See also **Dickson Jimmy Kombe**

(Administrator of the Estate of the late Jimmy Jacob Kombe) vs. Ruwaichi Jimmy Kombe, PC Civil Appeal No. 14 of 2019 (unreported).

In Probate Cause No. 61 of 2020, the Musoma Urban Primary Court was administering the estate of the **late Fares Nyambita Nyakutonya**. Before that court, there was no land dispute rather the probate cause and therefore I find under section 18(1)(a) of the MCA the Primary court had jurisdiction and justification to entertain the matter. This finding is not based on submission as adduced by counsels during hearing neither for the reasoning of the District Court in its ruling but on the foregoing analysis. I did that while knowing this court has duty to do so as was held in the case of **Kagera Pius Makunja Vs. John Mabhai Makunja and another**, Land Appeal No. 95 of 2021.

In the upshot I find and hold that both grounds raised lacks merit and I hereby dismiss the entire appeal without costs.

Dated at **MUSOMA** this 23 day of March, 2023.




M. L. KOMBA
Judge

Ruling delivered today 23 March, 2023 before Maria Bageni relative of AGRIPA FARES NYAKUTONYA and Mr. Elisha Fares Nyakutonya relative of BARAKA PHARE NYAKUTONYA the respondent.




M. L. KOMBA

Judge

23 March, 2023