

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(DAR-ES-SALAAM DISTRICT REGISTRY)**

**AT DAR-ES-SALAAM**

**CIVIL APPEAL NO. 393 OF 2021**

(C/O Kinondoni District Court, Misc. Civil Application No. 84 of 2021)

(L. Silayo, RM)

**PETER S/O MANASI SEME ..... APPELLANT**

**VERSUS**

**STELLA CHRISTIAN ..... RESPONDENT**

**JUDGMENT**

Date: 13/03 & 19/04/2023

**NKWABI, J.:**

The District Court dismissed the Miscellaneous Civil Application No. 84 of 2021 in which the appellant was seeking to set aside the dismissal order and restoration of Civil Appeal No. 20 of 2021. The case originated in the primary court of Kinondoni at Sinza in Civil Case No. 260 of 2020. The District Court dismissed the application because of two major grounds which are failure of the applicant to attend was caused by his advocate in the District Court on the date of mention of the appeal and illegality of the decision intended to be challenged was not found to be established. That was because the applicant did not enter appearance on 17/03/2021, 31/03/2021 and 29/04/2021. Also, poor communication was not accepted

by the District Court as sufficient cause. It was found that failure to appear was delaying justice. The alleged illegality too was not accepted.

In this appeal the counsel for the appellant lodged three grounds of appeal which are that:

1. That, the trial magistrate erred in law and fact in holding that the appellant's reasons and grounds raised in the application did not amount to sufficient cause.
2. That, the trial magistrate erred in law and facts in holding that the illegality in the impugned decision does not amount to sufficient cause and that the appellant ought to raise it during the hearing of the appeal.
3. That the trial magistrate erred in law and fact by entertaining extraneous matter/issues in reading her decision

It is for the above grounds that the appellant is praying this Court to make the following orders:

1. The ruling and order of the District Court of Kinondoni sitting at Kinondoni in miscellaneous civil application No. 84 of 2021 be quashed.
2. The appeal be allowed.

3. Costs be provided in favour of the appellant if the appeal will be contested by the respondent.

The appeal, was disposed of by way of written submissions. Mr. Jovinson Kagirwa, learned counsel, submitted for the appellant while the respondent was represented by Mr. Kenedy Lymo, learned counsel, who filed the submission for the respondent.

The reasons for the appeal were advanced based on two points. Firstly, that failure of the applicant to attend was caused by his advocate on the date of mention of the appeal and secondly the illegality of the decision intended to be challenged.

On the 1<sup>st</sup> ground of appeal, the counsel for the appellant maintained that the dismissal order was entered following poor communication on the side of the advocate who was providing free legal assistance which indeed was to the detriment of the appellant. That, in the view of Mr. Kagirwa was sufficient and good cause for this Court to quash and set aside the impugned ruling in Miscellaneous Civil Application No. 84 of 2021. He cited among other cases the case of **Bahati Mussa Hamisi Mtopa v. Salum**

**Rashid**, Civil Application No. 112/07 of 2018 (CAT) (unreported where it was stated:

*"Where there has been bonafide mistake, and no damage has been done to the other side which cannot be sufficiently compensated by costs, the court should lean towards exercising its discretion in such a way that no party is shut out from being heard; and accordingly, a procedural error, or even a blunder point of law, on the part of an advocate (including that of his clerk), such as failure to take prescribed procedural steps or to take them in due time, should be taken with humane approach and not without sympathy for the parties, and, in a proper case, such mistake if the interest of justice so dictate, because the door of justice is not closed merely because a mistake has been make by a person of experience who ought to have known better, and there is nothing in the nature of such a mistake to exclude it from being a proper ground for putting things right in the interest of justice and without damage to the other side, but whether the matter*

*shall be so treated must depend on the facts of each individual case."*

The counsel for the respondent was not moved. It was stated that it was clear that the absence was without good cause and the appellant received notice of hearing or was present when hearing date was fixed. It was insisted that the remedy in the circumstance was to dismiss the application (appeal). He cited **Lyamuya Construction Company Ltd v. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 CAT among other cases. He added, the lower court fairly dismissed the appeal for want of prosecution.

I agree with the counsel for the respondent. The district court fairly dismissed the appeal for want of prosecution. It was not a matter of communication but sheer negligence and as put by the district court that the appellant and her counsel were employing delay tactics to the detriment of the respondent. I may also add that the averments in paragraphs 8,9, and 12 of the affidavit in support of the application that was lodged in the district court requires an affidavit of the advocate or proof from the advocate who is mentioned there as per the case of

**Jacqueline Ntuyabaliwe Mengi & 2 Others v. Abdiel Reginald**

**Mengi & 5 Others**, Civil Application No. 332/01 of 2021, (unreported)

where the Court stated:

*"We note that paragraphs 8 and 14 of the 1<sup>st</sup> applicant's affidavit and paragraph 10 and 11 of Kahendaguza's affidavit **contain hearsay not supported by evidence.** For instance, in paragraphs 14 and 11 of the respective deponents affidavits they have averred an information obtained from the DR Fovo regarding how best they could deal with the so-called defective decree while the said DR has not sworn any affidavit to that effect."* [Emphasis mine].

I thus, uphold the decision of the district court in holding that the appellant did not give sufficient cause for non-appearance on three dates. The 1<sup>st</sup> ground of appeal is found to be unmerited and dismissed.

Next, I consider the alleged illegality in decision sought to be challenged. It was submitted by the counsel for the appellant that the alleged illegality was brought to light in Civil Application No. 84 of 2021 that Civil Case No 260 of 2020 was entertained as a normal civil case despite the fact that the

dispute emanated from the distribution of estate and the court could not entertain the case while the probate was not closed and pending before the primary court. It was argued that the magistrate failed and erred in holding that such illegality was not sufficient to warrant restoration of the appeal while the point of law was of sufficient importance. He cited **Principal Secretary, Ministry of Defence and National Service v. Deuram Valambia** [1992] T.L.R. 182 where it was stated:

*"In our view when the point at issue is one alleging illegality of decision being challenged, the court has a duty even if it means extending the time for the purpose to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the records right."*

It was however, the contention of the counsel for the respondent that the matter has been determined in full in civil appeal No. 20 of 2021 and this Court is functus officio and this appeal should be dismissed with costs.

I have considered the rival submissions, I am of the view that while this Court is not functus official as alleged by the counsel for the respondent,



the appellant did not establish any illegality in the decision of the trial court. The trial court entertained and considered if it had jurisdiction to entertain the matter and it decided in the affirmative, I think rightly so. The district court cannot be blamed for the decision it came to.

I am of the view that the alleged illegality is not apparent on the face of the record. The administrator may be sued by an interested party to the estate of the deceased, and in my view, he or she can be sued during the administration or after the administration for instance where the administrator has misappropriated the estate. I can exemplify the case of **Salima Moshi Athuman v Asha Kimolo**, [2010] TLR 367 (CAT) where it was held inter alia that:

*"We have had occasion to consider the case between Ibrahim Kusaga v. Emmanuel Mweta [1986] TLR 26 at p. 30 referred to us by Mr. Mchome (with leave as it was not listed in the list of authorities submitted). Though this is a High Court decision by which we are not bound, we however find the principle laid there in to be sound. In that case the learned Judge observed:-*



I appreciate that there may be cases where the property of a deceased person may be in dispute. In such cases all those interested in determination of the dispute or establishing ownership may institute proceedings against the Administrator or the Administrator may sue to establish claim of deceased's property.

*We are of the settled mind that the above is the approach that ought to have been taken in the circumstances of this particular case."*

So, the alleged illegality is not apparent on the face of the record and would require a long-drawn argument hence it violates the authority of **Lyamuya Construction Company Limited** case (supra) where it was stated that:

*"... such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction, (but) not one that would be discovered by a long-drawn argument or process."*

In the circumstances, the second ground of appeal is unmerited and is dismissed.

Finally, I consider the complaint by the counsel for the appellant that district court considered extraneous matters at page 7 of the ruling where it was observed that:

*"Therefore, it was important for the applicant to appear before the court of law for the purpose of solving the challenge and not to challenge outside the court which has competent jurisdiction."*

For the position of the law, the counsel for the appellant cited **Nyabezere Gora v. Charles Buya**, Civil Appeal No. 164 of 2016, Cat (unreported) where it was opined that:


*"In view of what we have endeavored to discuss, in particular what had transpired before the High Court, we are of the clear opinion that, though the learned High Court Judge considered extraneous issues, as earlier pointed out which was irregular, however she judiciously exercised discretion in refusing the appellant extension of time to lodge an appeal ... In consequence, we dismiss the appeal ..."*

Just as the Court of Appeal found in the above cited case, I am not persuaded that the extraneous matter caused miscarriage of justice. That ground of appeal is dismissed.

The culmination of the above deliberation, I hold that this appeal has no any merit. I dismiss the appeal with costs.

It is so ordered.

**DATED** at **DAR-ES-SALAAM** this 19<sup>th</sup> day of April, 2023



**J. F. NKWABI**  
**JUDGE**

