

IN THE HIGH COURT OF OF UNITED REPUBLIC OF TANZANIA
(MOROGORO SUB-REGISTRY)
AT MOROGORO

PC. PROBATE APPEAL NO. 14 OF 2022

(Arising from the Ruling in the District Court of Morogoro, at Morogoro in Probate Appeal No. 6 of 2022 and Originating from the Ruling of the Urban Primary Court of Morogoro in Probate and Administration Cause No. 268 of 2021)

TAILAI WILFRED TUPAAPPELLANT

VERSUS

NICOLOUS PIUS MPEKA.....1ST RESPONDENT

ARON INDUWA UFOO2ND RESPONDENT

RULING

26th June & 12nd September, 2023

CHABA. J.

This ruling is in respect of the preliminary objections (PO's) raised by the respondents' counsel on 10th March, 2023 against the appellant's appeal lodged in this Court on 23rd November, 2022 seeking to challenge the ruling of the District Court of Morogoro, at Morogoro in Probate Appeal No. 6 of 2022 delivered by Hon. R. Kasele (PRM) on 24th October, 2022.

As a background, the records of appeal briefly reveal that, the appellant, Tailai Wilfred Tupa applied for the letters of administrations of the estate of the late Pius Chambwali before the Urban Primary Court of

Morogoro in Probate Cause No. 268 of 2021. However, the respondents, Nicolous Pius Mpeka and Aron Induwa Ufoo successfully echoed an objection against her appointment as an administratrix and right away she was revoked. Dissatisfied by the said decision of the trial Urban Primary Court, the appellant preferred an appeal to the District Court of Morogoro vide Probate Appeal No. 6 of 2022. When the respondents were served with the petition of appeal, through the learned advocate, Mr. Joseph Assenga they filed reply to the petition of appeal on 8th June, 2022 coupled with the notice of points of objection. According to the Court records, the respondents successfully raised the PO's on points of law.

For records purposes, these points of objection are: One; That, the appeal was time barred, and Two; That, the appeal was incompetent and non-maintainable in law for failure to state that appellant was appealing in her representative capacity as an administratrix of estates of the late Pius Jonas Chambwali (the deceased).

As stated earlier, the appellant was unhappy with the decision of the first Appellate Court dated 23rd November, 2022 and therefore she lodged the present memorandum of appeal in this Court intending to challenge the said decision (ruling) delivered on the 24th October, 2022.

The respondents who enjoyed the legal services from the learned advocate, Mr. Joseph Assenga once again filed their joint reply to the memorandum of appeal accompanied by the notice of preliminary objections on points of law, to wit: -

- 1. That, the appeal is bad, incompetent and untenable in law for offending provisions of section 25 (3) of the Magistrate's Courts Act, [CAP. 11 R. E. 2019];*
- 2. That, the prayer of refiling the appeal craved by the appellant in this appeal is untenable, unmaintainable in law and not amenable by way of appeal.*

At the hearing of the above points of objection, Mr. Joseph Assenga, learned advocate from Novelt Advocates based in Dar Es Salaam entered appearance for the respondents whereas the appellant was ably represented by Mr. Michael Mwambanga, also learned advocate from Mwambanga & Associates Advocates based in Morogoro. With the parties' consensus, the points of objection were disposed of by way of written submissions. Both parties filed their respective submissions timely and I commend them for their punctuality.

For purposes of serving precious time of the Court, I will only consider the first point of law as in my unfeigned opinion, it suffice to dispose of the entire appeal.

Submitting in support of the first limb of preliminary objection, to wit; this appeal is bad, incompetent and untenable in law for offending the provision of section 25 (3) of the Magistrate's Courts Act, [CAP. 11 R. E. 2019], (the MCA), Mr. Assenga highlighted that, the appellant wrongly filed the present appeal straight to this Court instead of channeling the same before the registry of the District Court of Morogoro. He averred that, section 25 (3) of the MCA (supra) clearly states that, every appeal to the High Court shall be by way of petition and shall be filed in the District Court from the decision or order in respect of which the appeal is brought. He further underlined that, under section 25 (4) of the MCA (supra) the law articulates that, upon receipt of a petition under this section, the District Court shall forthwith dispatch the petition, together with the record of the proceedings in the Primary Court and the District Court, to the High Court.

It was Mr. Assenga's submission that, since there is no dispute that the matter at hand stemmed from the proceeding of the Urban Primary Court of Morogoro in Probate Appeal and Administration Cause No. 268 of 2021, and taking into account that this is the second appeal which

originates from the decision of the Primary Court, in his opinion, the applicable law is the MCA and The Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules GN. No. 312 of 1964, in particular Rules 4 (1) & (2) and 5 (3) & (4) which emphasizes on the same spirit. He further submitted that, the whole process of filing this appeal did not comply with the legal requirement as the appeal is worded "MEMORANDUM OF APPEAL" instead of "PETITION OF APPEAL".

Based on the above submission, Mr. Assenga stressed that as the present appeal was improperly filed in this Court, there is no doubt that this Court lacks jurisdiction to hear and entertain the same and the only remedy available, is to reject it summarily. He therefore, invited the Court to invoke its power bestowed under the provision of section 28 (3) of MCA (supra). To buttress his contention, he cited the case of **Omary Hamisi Faraji Vs. Wahida Elieshi Kyerulomi (Civil Appeal No. 4 of 2022) [2022] TZHC 13 (27 January 2022), 27 January 2022** (Extracted from www.tanzlii.org) where this Court (I. C. Mugeta, J.) *suo motu* rejected the appeal upon invoking the provision of section 28 (3) of the MCA after being satisfied that, mandatory procedures on appealing to this Court on matters originating from the Primary Court were not complied with by the appellant.

Responding to the above submission, Mr. Michael Mwambanga, the learned Counsel for the appellant accentuated that section 25 (3) and (4) of the MCA and Rules 4 (1) & (2) and 5 (3) & (4) of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules GN. No. 312 of 1964, relied upon by Mr. Assenga are merely vehicles used to carry the substantive package to its destination, meaning that they are only procedural laws that governs appeals from Primary Court to this Court. He said, application of these procedural law should not be used to defeat substantive justice. To support and strengthen his argument, Mr. Mwambanga referred this Court to a persuasive decision from Indian's jurisdiction in the case of **Ramankutty Gupta Vs. Avara, AIR 1994 SC 1699** where the Court held:

"It must be noted that the procedure is the handmaiden for justice and unless the procedure concerns the jurisdiction issue, it should be qualified to subserve substantial justice. Therefore, technicalities would not stand in the way to subserve substantive justice, except when the question of jurisdiction arises."

To conclude, Mr. Mwambanga urged the Court to overrule the raised PO's and proceed to hear the appeal on merits.

Having summarised and considered the rival submissions made by both parties and upon going through the entire Court records, it is my considered view that in the eyes of the law, non-compliance with the mandatory legal procedural requirements cannot be salvaged by the overriding objective principle. In this case, as rightly submitted by Mr. Assenga, the Learned Advocate for the Respondent, the noncompliance of the provision of section 25 (3) of the Magistrate's Courts Act has affected the jurisdiction of this Court. I say so because, it is trite law that, an appeal is a creature of the law. Any person intending to lodge an appeal before the Court of law, he or she must do so in accordance with the law. This position of the law was underscored by the Court of Appeal of Tanzania (the CAT) in the recent case of **Alberto Mtega Vs. Republic (Criminal Appeal No. 545 of 2020) [2023] TZCA 142 (27 March, 2023)** (Extracted from www.tanzlii.org), where the Court held:

"On our part, we hasten to say that at any given level, an appeal is a creature of the law. Any person intending to lodge an appeal before the court of law therefore, must do so in accordance with the law".

As regards to the mandatory requirement and compliance with the provision of section 25 (3) and (4) of MCA, the CAT in the case of **Sophia**

Mdee Vs. Andrew Mdee & 3 Others, Civil Appeal No. 5 of 2015, CAT sitting at Arusha (unreported), had the following to state upon facing akin situation on pages 8-9:

"The starting point is the procedure as to how and where an appeal is lodged in the High Court on matters originating from Primary Courts. S. 25 (3) & (4) which falls under Part III of the Act provide the answers. It reads: -

(3) Every appeal to the High Court shall be by way of petition and shall be filed in the District Court from the decision or order of which the appeal is brought.

(4) Upon receipt of a petition under this section, the district court shall forthwith dispatch the petition together with the record of the proceedings in the primary court and the district court, to the High court.

The Court of Appeal went on explicating further that: -

"From above it is clear that if one intends to appeal in the High Court from the decision or order of the district court in matters originating from primary courts, he has to lodge his petition of appeal in the district court

*which handed down the decision and the district court
shall immediately forward the same to the High Court”.*

Now, taking cognizance of the above cited authority, I hasten to hold that, since the appellant failed to comply with the provision of section 25 (3) and (4) of the MCA (supra), it therefore goes without saying that, the powers of this court to handle and entertain the present appeal has been ousted and deprived of by the law as herein indicated above.

For the above reasons, I find this appeal incompetent before this Court and hereby proceed to struck it out from the registry of this Court, as I hereby do. Order Accordingly.

DATED at MOROGORO this 12nd day of September, 2023.




M. J. Chaba

JUDGE

12/09/2023

Court:

Ruling delivered in chambers on this 12nd September, 2023 in the presence of Ms. Levina Mtweve, Learned Advocate, holding brief for Mr. Michael Mwambaga, Learned Advocate for the Appellants and in the absence of both Respondents.




L.B. Lyakinana

Ag/Deputy Registrar

12/09/2023

Court:

Right to Appeal to the parties fully explained.




L.B. Lyakinana

Ag/Deputy Registrar

12/09/2023