

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

**DAR ES SALAAM SUB-REGISTRY**

**AT DAR ES SALAAM**

**CIVIL APPEAL NO. 110 OF 2023**

*(Originating from Misc. Civil Application No. 4 of 2023 in the District Court of Bagamoyo District at Bagamoyo as per Hon.Mmanya, RM dated 26/06/ 2023 which originated from Mirathi No.13 of 2022 at Kerege Primary Court dated 26/08/2022)*

**AURELIA LONGINUS MBANO .....APPELLANT**

**VERSUS**

**MAMERTHA THEOFIL BAMALIZE.....RESPONDENT**

**JUDGMENT**

*Date of last Order: 31/10/2023*

*Date of Judgment: 17/11/ 2023*

**GONZI, J.;**

The Appellant brought the present appeal challenging the Ruling of the District Court of Bagamoyo in Civil Application No.4/2023 dated 26<sup>th</sup> June 2023 which declined her application for extension of time to appeal to the District Court of Bagamoyo against the decision of the Primary Court of Kerege dated 26<sup>th</sup> August 2022.

Apparently, the Appellant was aggrieved with the decision of the Primary Court in the probate matter and lodged Revision application in the District Court of Bagamoyo timely. But her revision application was dismissed on

9<sup>th</sup> February 2023 on the ground that she had an alternative right to appeal. Therefore, she decided to appeal but was out of time for 55 days from the date of delivery of the decision in her revision proceedings. Therefore, she lodged the Civil Application No.4/2023 in the District Court for extension of time to appeal. In her application she alleged illegality of the decision of the Primary Court to adjudicate and determine a land dispute over which it had no jurisdiction. She attempted to account for the delay that she was in deep consultation with her Advocates. In its Ruling, the District Court Dismissed the application on the finding that the alleged illegalities were far-fetched and not apparent on the face of records of the Primary Court decision. Also he found that the delay of 55 days which the Appellant had used for deep consultation with her lawyers was inordinate. The appellant was aggrieved with the above Ruling which denied her the extension of time and thus she lodged the present appeal. Her grounds of appeal are that:

1. That the trial Court Magistrate erred both in law and facts in dismissing the application while the issue of illegality alleged by the appellant against the decision of Kerege Primary Court being appealed against was sufficient enough to allow the application.

2. That the trial Court Magistrate erred in law and fact in deciding the matter in favour of the respondent basing on the reason that the Appellant was negligent in not pursuing the appeal in time while since the decision of Kerege Primary Court the Appellant is always in court fighting for her rights to challenge the said decision the fact which amount to due diligence.
3. That the trial Court Magistrate erred in law and fact by deciding the matter in favour of the respondent while grant of the application could not in any way prejudice the Respondent as todate the Appellant is the lawful owner of the landed property situated at Mapinga area at Bagamoyo District Coast Region.
4. That the trial court Magistrate erred in law and fact in deciding the matter in favour of the respondent while due diligence exercised by the appellant in pursuing the matter since the decision of Kerege Primary Court was sufficient to grant the application.
5. That the trial Court Magistrate erred in both law and fact by deciding the matter in favour of the respondent with bias for failure to address and evaluate properly the issue of illegality and the submissions filed by the parties to the trial court.

The Appellant therefore prayed that the appeal be allowed and that this court orders the extension of time for the appellant to file an appeal against the decision of Primary Court of Kerege dated 26<sup>th</sup> August 2022 to the District Court.

The appeal was heard by way of written submissions. Mr. Frank Ntuta, learned counsel represented the Appellant while Mr. Ambroce Menace Nkwera learned Advocate represented the Respondent. Both parties duly made their submissions. I will not reproduce the submissions in this ruling but I have read them and the authorities referred therein. In the course of my Judgment, I will make reference to the relevant portions of the submissions.

In the first ground of appeal, the appellant is complaining that the Honourable Resident Magistrate in the District Court erred both in law and facts in dismissing the application while the issue of illegality alleged by the appellant against the decision of Kerege Primary Court being appealed against was sufficient enough to allow the application.

I understand that illegality once proved is a good ground for extension of time even where the Applicant does not account for every single day

of delay. In the case of **Charles Richard Kombe versus Kinondoni Municipal Council**, Civil Reference No.13/2019 the Court of Appeal held that where illegality is put forward as a ground for extension of time, the applicant must substantiate illegalities in terms of lack of jurisdiction on the part of the court that decided the case; that the case was barred under the law of limitation or there was a denial to the applicant of the right to be heard.

So, I had to consider whether the decision of the Primary Court which was placed before the learned Resident Magistrate in the application for extension of time to appeal, contained some features suggestive of illegalities on the face of records? In the submissions by the Applicant, the argument is that the decision of the Primary Court was tainted with illegalities. Mr. Frank Ntuta argued that while the Primary Court had no jurisdiction to determine over ownership of the disputed land matter located at Mapinga area, Bagamoyo District, Coast Region, it proceeded to hear and determine land matters contrary to the law. He referred the court to section 4(1) of the Land Courts Disputes Act Cap 216 which ousts jurisdiction of the ordinary courts to determine land disputes. He referred the Court to the prayers (b) and (c) granted in the Primary

Court in Mirathi No.13 of 2022 which held that transfer of ownership of the Mapinga plot of land to Aurelia Longinus Mbano was void and that the Applicant therein was to vacate the land (house) immediately and leave it to the heirs. Mr.Ntuta cited numerous cases of the Court of Appeal and the High Court to the effect that once illegality exists the Court has a duty to extend time for the purpose of ascertaining the point. He cited the decision of **James Anthony Ifada versus Hamis Alawi**, Civil Appeal No.482/14 of 2019 decided by the Court of Appeal of Tanzania at Shinyanga.

On the other hand Mr.Nkwera, learned Advocate argued that indeed illegality is a good ground for extension of time. But the illegality has to be on the face of records and not one which will be drawn from long argument or process. He cited the case of **the Board of Pentecostal Church of Tanzania versus Asha Selemani Chambanda and another**, Civil Application No.63/07 of 2023 decided by the Court of Appeal at Mtwara. He also referred to the case of **Mgeni Seif versus Mohamed Yahya Khalfani**, Civil Appeal No.1 of 2009, decided by the Court of Appeal at Dar es Salaam where it was held that:

**“where there is a dispute over the estate of the deceased, only the probate and administration Court seized of the matter can decide on the ownership”.**

The learned advocate submitted therefore that the trial Primary Court had jurisdiction to entertain and determine the fate of the deceased's estate. There was no illegality, therefore. The Respondent's counsel concluded.

I made reference to the decision of the Primary Court of Kerege at page 10 the Court held:” **katika shauri hili utoaji wa zawadi eneo la Mapinga haukuwa sahihi kisheria kwa kuwa mke wa mtoaji hakutoa ukubali wa eneo kutolewa kama zawadi. Katika kesi ya Zakaria Mubiru (1995) TLR 211(CA) Mahakama ya Rufaa ilisema huwezi kuhamisha umiliki wa ardhi Kwenda kwa mtu mwingine bila ukubali wa mwanandoa mmoja. Aliyepewa zawadi alijua kuna mke alikuwepo pale hivyo alikuwa na wajibu wa kuhakikisha mke amekubali yeye apewe mali kama zawadi na kwa namna hiyo makubaliano hayo ya kupewa zawadi ni batili kwa kuwa mleta maombi hakupewa eneo hilo kihalali”.**

The above quoted text implied that in transfer of landed matrimonial property as a gift, spousal consent was mandatory. Lack of spousal consent rendered the purported transfer a nullity.

The above excerpt shows that indeed the Primary court was determined a land ownership dispute with another person while handling the probate cause. The question is whether that was proper or rather it was a patent illegality. There are conflicting decisions of the Court of Appeal on this area. In the case of **Mgeni Seif versus Mohamed Yahya Khalfani**, Civil Appeal No.1 of 2009, decided by the Court of Appeal at Dar es Salaam it was held that:

***“where there is a dispute over the estate of the deceased, only the probate and administration Court seized of the matter can decide on the ownership”.***

In the case of **Stephen Maliyatabu and another versus Consolata Kaluhanga**, Civil Appeal No.337 of 2020 decided by the Court of Appeal at Tabora, the Court of Appeal at page 13 observed that:

***“we are inclined to point out that what is contained in the impugned judgment really taxed our mind because while the matter subject of this appeal is probate and administration cause, when one looks at the evidence***

***martialed and the impugned judgment the impression is that what was before the High Court is a matrimonial dispute governed by the Law of Marriage Act...***"

At page 17 the Court of Appeal went ahead to state that:

***"On account of what we have endeavored to discuss, it is our considered view that the impugned judgment was not proper as the learned High Court Judge who went beyond the scope exceeding his jurisdiction embarked on a nullity. In other words, since the jurisdiction of court is a creature of statute, a matrimonial dispute cannot be adjudicated in a probate and administration cause as it transpired in the case at hand. Thus we agree with the parties that the Judgment and proceedings of the High Court are vitiated and they cannot be spared."***

In the current appeal it is apparent that the High Court is faced with two conflicting decisions of the Court of Appeal. This court is bound by the decisions of the court of appeal regardless of their correctness. In **JUMUIYA YA WAFANYAKAZI TANZANIA v KIWANDA CHA UCHAPISHAJI CHA TAIFA** (1988) TLR 146, the Court of Appeal held that: **all courts and tribunals below the Court of Appeal are bound by decisions of the Court regardless of their correctness.**

I understand that there are rules of procedure and techniques which a court faced with two binding and conflicting decisions of a superior court can follow and use to navigate through its task of applying the law to the facts at hand with a view to determining the dispute before the court. Following the most recent decision is one of the ways out. Distinguishing one of the decisions is also a way out. Following the most correct decision is also an option. But I am of the view that a lower court is not in the best position to declare as between two conflicting decisions of the superior court, which one is the most correct. Under the doctrine of precedent, the lower court has no powers to overrule a decision of a superior court expressly or impliedly. Following the most recent decision makes logic on the assumption that the superior court while establishing the subsequent decision was aware of its earlier decision and in making a conflicting decision, the superior court was thereby impliedly making a departure from the legal position contained in the earlier decided case. I also know that there is uncertainty in the practise of treating conflicting decisions of the superior courts. On my part, I have to decide the case before me. I have noted that the Primary Court while handling a probate case determined also matrimonial

property land dispute. That is exactly what was forbidden in the case of **Stephen Maliyatabu and another versus Consolata Kaluhanga**, Civil Appeal No.337 of 2020 decided by the Court of Appeal at Tabora. This appears to be suggestive of an illegality. The same was brought to the attention of the District Court in the Civil Civil Application No.4/2023 as among the grounds upon which extension of time to appeal was being sought but the District Court held that the illegality was far-fetched and not apparent. I am of the view that the application ought to have been allowed. The record of Primary Court was suggestive on illegality pertaining to jurisdiction of the Court. Allowing the extension of time to appeal would have accorded the District court an opportunity to consider the issue of jurisdiction as an illegality in detail. I am not conclusively saying that there was an illegality in the decision of the Primary Court, as I am not entertaining an appeal in respect thereof. I am saying that sufficient facts were brought to the attention of the District Court for it to find that there was a sufficient cause to extend the time only on the ground of illegality. As the District Court did not properly decide this point, I find it committed an error.

It is common ground that illegality it successfully raised, is enough to justify the court extending time even where the applicant has not accounted for every single day of the delay. As I am persuaded to extend time on the basis of illegality, I see no reason to determine the other grounds of appeal. Also due to the genesis of this case being probate matter, I make no order as to costs.

Therefore, the appeal is allowed.

1. I do hereby set aside and quash the Ruling of the District Court of Bagamoyo in Civil Application No.4/2023 dated 26<sup>th</sup> June 2023.
2. I grant the Appellant 15 days extension of time from the date of this Judgment to file an appeal in the District Court of Bagamoyo against the decision of the Primary Court of Kerege dated 26<sup>th</sup> August 2022.
3. Each party shall bear its own costs.

It is so ordered. Right of appeal explained.



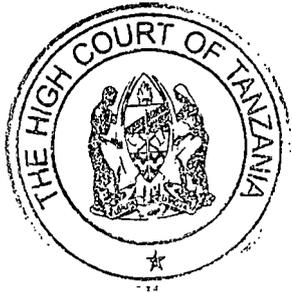
A handwritten signature in black ink, appearing to read "A.H. Gonzi", is written over the printed name.

**A.H.Gonzi**

**JUDGE**

**17/11/2023**

Judgment is delivered in Court today 17<sup>th</sup> day of November 2023 in the presence of Mr. Mtuta Advocate for the Appellant and Mr. Malekela advocate for the Respondent.



A handwritten signature in black ink, appearing to read "A.H. Gonzi", is written above the printed name.

**A.H.Gonzi**  
**Judge**  
**17/11/2023**