

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

CIVIL APPEAL NO. 25 OF 2023

(Arising from Probate Appeal No. 20 of 2022 from the District Court of Morogoro before
Hon. E. C. Lukumai, SRM, and Originating from Probate and Administration Cause No.
56 of 2020 from Morogoro Urban Primary Court)

JOSEPHAT LASUDI JAGILA NSHASHI 1ST APPELLANT

FLORIDA LASUDI JAGILA NSHASHI 2ND APPELLANT

VERSUS

DOTO AKIDA MZEE..... RESPONDENT

RULING

14/02/2024

KINYAKA, J.:

Before me is the Appellants' Civil Appeal No. 25 of 2023 challenging the decision of the District Court of Morogoro in Probate Appeal No. 20 of 2022 delivered on 06/07/2023. The Probate Appeal No. 20 of 2022 arose from the decision of Morogoro Urban Primary Court in Probate and Administration Cause No. 56 of 2020 delivered on 15/11/2022. Together with the memorandum of appeal, the Appellant attached an application for extension of time, accompanied by an affidavit of the 2nd Appellant in support of the application. I must state at the outset that the application for extension of



time though bears the court's received stamp, it does not bear any application number signifying its admission in Court.

On 30/10/2023, this Court scheduled hearing of the application for extension of time on 22/11/2023. When the parties appeared before me today, they prayed to argue preliminary objection on points of law raised by the Respondent against the application for extension of time, by way written submissions. The Appellants were duly represented by Mr. Abraham Shamumoyo, learned Advocate and the Respondent appeared in person as his Advocate, Mr. Benjamin Jonas Motika was unable to travel from Babati to Morogoro to attend today's hearing.

Upon noting that what is before me is an appeal and not an application for extension of time, I asked parties to address me on the propriety of the appeal and the application accompanying the memorandum of appeal pursuant to the requirement of Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) G.N. No. 312 of 1964, (hereinafter, the "Rules").

Mr. Shamumoyo started by informing the Court on the history of the present appeal that it emanated from Primary Court. He contended that the Appellants' appeal to the District Court was unsuccessful. He submitted that

the Appellants were aggrieved by the decision of the District Court and intended to appeal to this Court but they could not appeal within 30 days as required by law. Counsel contended that the Appellants complied with the requirement of Rule 3 of the Rules by lodging the present appeal together with the application for extension of time. He argued that the term 'shall be accompanied by' used in Rule 3 of the Rules does not imply that one should follow the other, but it means that both the petition of appeal and the application for extension of time should be lodged concomitantly.

Counsel argued further that there is no interpretation of section 3 of the Rules as to which one between the appeal and application for extension of time should precede the other, but he prayed the Court to be guided by the decision in the case of **Bonaventura Samuel v. Michael Grace Masatu and Esther Masatu, Misc. Application No. 2 of 2021**, High Court (Ndunguru, J.) where it was held that the applicant is supposed to appeal within 30 days from the date of impugned decision or order of the primary court as per Rule 3 of the Rules. He argued that the cited case further held that the law demands an application for leave to appeal out of time for all matters originating from decision or order of the Primary Court should be accompanied by a petition of appeal or set out the grounds of objection to

the decision or order appealed against. He urged the Court to find the Appellants duly complied with Rule 3 of the Rules.

In reply, the Respondent submitted that it was not correct for the Appellants to file their appeal before the application for extension of time. According to her, it is upon an order for extension of time that the Applicant would be allowed to lodge their appeal out of time.

Mr. Shamumoyo, learned Counsel rejoined that the procedure adopted by the Appellant is the one required under Rule 3 of the Rules in respect of cases emanating from Primary Courts. The procedure suggested by the Respondent relates to cases that do not emanate from the Primary Courts. He reiterated that the procedure adopted by the Appellants is correct.

In determining the issue before me, I find it necessary to reproduce Rule 3 of the Rules which provides as below:-

3. Applications for leave to appeal out of time

An application for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of

the decision or order against which it is desired to appeal, and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order:

Provided that where the application is to a district court, the court may permit the applicant to state his reasons orally and shall record the same. [Emphasis added]

The above provision does not require a complexity exercise to interpret. From the clear wording of Rule 3 above in respect of appeals emanating from primary courts, the intended Appellant is required to apply for extension of time upon his or her delay to lodge his appeal within 30 days after the decision of the district court. The Appellant is required to accompany or attach the petition of appeal, or set out the ground of objection to the decision or order he desires to appeal against, to the application for extension of time.

In the present matter, the Appellants lodged Civil Appeal No. 25 of 2023 accompanied by an application for extension of time, which is the opposite of what Rule 3 of the Rules require. It is my considered view that the intent of Rule 3 of the Rules require the appellant to lodge an application for extension and attach his petition of appeal to the application for extension of time and not the opposite.



The reason for my holding is not farfetched. If a party delays to file a suit in any forum, he must first apply for leave to have his suit admitted or heard out of time by an application for enlargement of time. I do not accept the invitation by the learned Counsel for the Appellants that the proper course taken by the Appellants is correct and in accordance with Rule 3 of the Rules. To the contrary, Rule 3 require the petition of appeal to accompany the application for extension of time and not *vice versa*. The reason being that an appeal will only be preferred upon obtaining an order for enlargement of time.

The decision cited by Mr. Shamumoyo in the case of **Bonaventura Samuel** (supra) is relevant in this matter to the extent that in the cited case, the Court insisted on the requirement to attach a copy of the petition of appeal to the application for extension of time as required under Rule 3 of the Rules. The decision cements the position of the law, which I subscribe, that a petition of appeal should accompany or be attached to the application of extension of time and not *vice versa*. It also cements the view I have taken that 'accompanying' or to 'be accompanied by' means that the application for extension must be attached or escorted by a petition of appeal. It does not mean that any between the petition of appeal or an application for

extension of time, may precede the other as argued by the learned Counsel for the Appellants.

I hold that a petition of appeal cannot precede an application for extension time, for the appeal is already out of time. In an appropriate course in this matter, I would have determined the Civil Appeal No. 25 of 2023 that is before me, irrespective the application for extension of time which was attached to the petition of appeal. If I take the course suggested by the Appellant's Counsel that the manner of filing the present appeal accompanied by application for extension of time is appropriate, I will end up dismissing the appeal for being out of time.

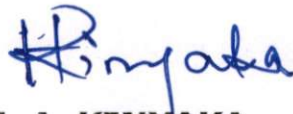
In view of the fact that the present appeal has been improperly filed while attempting to comply with Rule 3 of the Rules, and the fact that it is the memorandum of appeal which preceded an application for extension of time which has not been properly filed, I hereby strike out the appeal that has placed before me. The Appellants are at liberty to lodge a fresh application for extension of time accompanied by a petition or memorandum of appeal within the dictates of Rule 3 of the Rules.

by

As the issue of propriety of the matter was raised by the court *suo moto*, I
make no order as to costs.

It is so ordered.

DATED at **MOROGORO** this 14th day of February 2024.



H. A. KINYAKA

JUDGE

14/02/2024

