IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MOSHI SUB-REGISTRY

AT MOSHI

PC CIVIL APPEAL. 14 OF 2023

(C/F Miscellaneous Application No. 04 of 2023 in the District Court of Hai at Hai. Originating from Probate Cause No. 36 of 2014 in Hai Kati Primary Court)

EPHATA DAVID MAREALLE…… APPELLANT

VERSUS

MARY DAVID MAREALLE…..……RESPONDENT

JUDGEMENT

Date of Last Order: 08.05.2024
Date of Ruling : 05.06.2024

MONGELLA, J.

The respondent herein sought to be appointed executrix of the estate of the late David Robert Marealle vide Probate Cause No. 34 of 2014 in the primary court of Hai District at Hai Kati (hereinafter, the trial court). In the said matter, the respondent stood unopposed. Her application was heard and finally on 25.08.2014, the trial court, deeming her worthy, appointed her as the executrix of the estate.

On 03.04.2023, the appellant herein filed Miscellaneous Civil Application No. 04 of 2023 in the district court of Hai at Hai (hereinafter, the district court) seeking enlargement of time to file an appeal against the decision of the trial court delivered on

25.08.2014; costs of the cause and any relief the court deemed fit to grant. His application was supported by his sworn affidavit. The respondent challenged the application vide her own sworn counter affidavit whereby she also filed a notice of preliminary objection with two (2) points, to wit:

> *(a)The Applicant has no locus in the affairs and administration of the Estate of the Late David Robert Marealle; and*
>
> *(b) The affidavit supporting the application is incurably defective for containing extraneous matters by way of factual and legal arguments, opinions, conclusions and assumptions under paragraphs 4, 5, 6, 7, 8, 9, 10, 11, 13 and 14 therein.*

After hearing the parties' submissions on the preliminary objection, the district court sustained the 1st point of objection and dismissed the application without costs. Now aggrieved, the applicant has sought this appeal on 5 grounds, to wit:

1. *That the district court of Hai erred in law and fact for not considering that the preliminary objection must be raised on point of law and not on issues of facts.*

2. *That, the district court of Hai erred in law and fact by deciding that the appellant has no locus standi in the affairs and Administration of the estate of the late David Robert Marealle.*

3. *That the district court of Hai erred in law and fact by not considering the application by the appellant was on probate cause, the aggrieved heir has right to appeal to challenge the decision of lower court regardless whether the appellant was a party to the proceedings in lower court or not.*

4. *That the district court of Hai erred in law and fact by failure to consider the issue of illegality in determining the preliminary objections.*

5. *That the district court of Hai erred in law and fact by failure to exercise judicial discretion in granting leave to the appellant.*

The appeal was resolved orally whereby both parties stood represented. The appellant was represented by Mr. Peter Michael Madeleka and Ms. Jamila Ilomo while the respondent was represented by Mr. Francis Stolla, all learned advocates.

Addressing the 1st ground, Mr. Madeleka averred that the application was resolved on preliminary objection and not on merit. He argued that in the Ruling, the district court Magistrate stated that the appellant had the duty to prove that he had *locus standi* in the case on which he sought extension of time to appeal. In that respect, he challenged the finding of the Hon. Magistrate arguing that had the Magistrate properly directed herself, she would have noted that the point of objection required evidence by the

appellant rendering it to lack qualification as a preliminary objection. In support of his argument, he cited the case of **Shose Sinare vs. Stanbic Bank Tanzania Limited & Another** (Civil Appeal 89 of 2020) [2021] TZCA 476 (16 September 2021) TANZLII, whereby the Court of Appeal revisited the case of **Soitsambu Village Council vs. Tanzania Breweries Limited & Another** (Civil Appeal No. 105 of 2011) [2012] TZCA 255 (17 May 2012) TANZLII. The decisions insist on no reference to evidence when resolving a preliminary objection.

The learned counsel further pointed out that the Hon. Magistrate based her findings on sustaining the point of objection on the date the deceased died and the date the clan meeting was held and went further to mention the Will. He claimed further that the Hon. Magistrate further deliberated on matters she was not inquired to deliberate upon as she proceeded to adjudicate the main application while the matter before her was for extension of time.

With regard to the 2nd ground, Mr. Madeleka contended that since the matter was for extension of time, the magistrate should have observed the reasons for delay and not any other matters. He argued further that the appellant had advanced illegality of the decision of the trial court as a ground for extension of time and the trial magistrate ought to have directed herself on the position of the law. He added that the position is that where there is an illegality, then the court should grant parties the opportunity so that the illegality could be considered. He backed the assertion with the case of **Arunaben Chaggan Mistry vs. Naushad Mohamed Hussein & Others** (Civil Application No 6 of 2016) [2016] TZCA 2026 (20

October 2016) TZCA TANZLII. Reiterating his arguments as to the objection requiring evidence, he held the that since the matter was for extension of time, the issue of locus should have not been raised. That, the same should have been left for an appeal if extension would have been granted.

Expounding on the 3rd ground, Mr. Madeleka challenged the trial Magistrate arguing that she erred by not considering that the application by the appellant was a probate cause. In his view, in a probate cause, an aggrieved heir has the right to appeal to challenge the decision of the lower court regardless of whether he or she was a party to the proceedings in lower court or not. He contended that, in a probate cause, there is usually no parties but a petitioner and beneficiaries. In that respect, he found the district court's finding that the appellant was not to appeal or apply for revision being contrary to the law. That, the ground invoked by the lower court magistrate was a ground not backed by any law. He insisted that the appellant had the right to apply for extension of time in the district court because he believed the proceedings by the trial court were illegal and he wanted to challenge the same, but was out of time.

On the 4th ground, the learned counsel averred that the preliminary objection was to be based on the nature of the application in the sense of competence of the application. On those bases, he considered the raised points of objection not qualifying as points of law rendering the district court to have merely abdicated its duty to determine the application. He maintained his point challenging

the district court Magistrate for what he termed considered another point but not that of illegality which was of law.

As to the last ground, Mr. Madeleka averred that courts are with discretion to grant enlargement of time. However, he said, the trial court failed to exercise its discretion judiciously by enlarging time for the appellant to appeal. Pointing out that this court has supervisory powers over all subordinate courts as per **section 44 (1) (a) of the Magistrates Courts Act** [Cap 11 RE 2019], he called the court to invoke its jurisdiction under **Section 76(1)(a) of the Civil Procedure Code** [Cap 33 R.E 2019] to step into the shoes of the lower court and grant reliefs prayed by the appellant in the district court. He finalized his submissions by praying for the court to award the appellant reliefs he sought in the district court.

The appeal did not go unopposed. In reply, Mr. Stolla first pointed out that there were two points of objection and the district court briefly deliberated on the 2nd point, but Mr. Madeleka did not submit on the same before this court.

After such remark he went on making his submissions starting with the 1st ground. In reply to this ground of appeal, he claimed that the trial Magistrate relied on the record before her. He contended that the record includes facts on which the objection was founded. He remarked that it is undisputed that the appellant was not involved in the matter in the primary court. Further, that the district court has the duty to take judicial notice of the primary court record according to **Section 68 and 69 of the Evidence Act** [Cap 06 R.E 2022]. He referred the court to the case of **Legal & Human Rights**

Centre & Another vs. Hon. Mizengo Pinda & Another (Misc. Civil Cause 24 of 2013) [2014] TZHC 1 (6 June 2014) TANZLII to buttress his point. Arguing further, he alleged that the fact that the appellant was not a party to the proceedings before the trial court were not ascertained, thus was validly determined by the district court.

Replying to the 2nd ground, Mr. Stolla averred that the objection was on *locus standi*. He argued that both, *locus standi* and jurisdiction are points of law as stated in **Legal and Human Rights Centre** (supra). In that respect, he had the stance that the district court did not err in regarding the question of *locus standi* a point of law. He considered the appellant's counsel to have supported his stance as he admitted that the appellant was not a party to the case in the trial court.

On the 3rd ground, Mr. Stolla firmly contended that the appellant had no right to appeal. He added that the right to appeal is reserved for parties. That, **Section 20 (1)(b) of the Magistrates' Courts Act** offers the right of appeal to parties of the case.

Concerning revision, he argued that the same is reserved for parties without the right to appeal. In support of his arguments, he referred the case of **Jacquiline Ntuyabaliwe Mengi & Others vs. Abdiel Reginald Mengi & Others** (Civil Application 332/01 of 2021) [2022] TZCA 748 (1 December 2022) TANZLII. Further, he cited the case of **Kessy Ally & 2 Others vs. Gidion Kaino Mandesi** (Land Revision 34 of 2020) [2022] TZHCLandD 197 (31 March 2022) and **Ridhiwani Idd Machambo & Three Others vs. Anna Manford Inunu** (Civil Appeal No. 64 Of 2022) [2023] TZHC 20015 (31 July 2023) whereby this court

emphasized on the right to appeal as opposed to that of revision. Banking on the strength of the coted authorities, he held the stance that the appellant had no right to seek for extension of time to appeal as he was not a party to the proceedings in the trial court and the district court was right in its decision.

With regard to the 4th ground, he replied that the Hon. Magistrate was right to direct her mind on the preliminary objection raised and not to address the issue of illegality on the application for extension of time. In his view, doing so would be premature determination of the application as the ground of illegality was to be dealt with on determination of the application on merit. He argued further that the district court Magistrate was not under any legal duty to canvass the point of illegality while she was entertaining a preliminary objection on point of law.

Lastly, on the 5th ground, Mr. Stolla found the contention therein premature. He argued so, on the ground that the said ground is crafted as if the application for extension of time was canvassed on merit while it was not as the district court was rather entertaining a preliminary objection. He contended that even if the points of preliminary objection raised were overruled, the district court in that ruling could not grant leave or an order for extension of time because that would have equally been premature.

He further pointed out that this court has powers of revision over the proceedings of the subordinate court, but it is entertaining an appeal at this moment. So, in the circumstances, he held the view that the appellant cannot take refuge under the provisions of

Section 44 (1) (a) of the Magistrates' Courts Act and **Section 76 (1) (a) of the Civil Procedure Code**. He thus concluded by praying for the appeal to be found lacking merit and consequently be dismissed, with costs.

Rejoining, on the 1st ground, Mr. Madeleka claimed that Mr. Stolla had departed from his duty as an officer of the court. He argued so saying that he deceived the court by presenting that the 2nd point of preliminary objection was. He argued that the trial court merely summarized the parties' submissions on the said objection. With regard to his submission in chief in this appeal, he contended that the ruling was in relation to the 1st point of objection and that is why the appellant herein focused his submissions on that first point.

While admitting that the appellant was not a party to the proceedings in the trial court, he maintained that he could hardly be a party as the matter was non-contentious. He purportedly distinguished the case of **Legal and Human Rights Centre** (supra) on the ground that it was not binding to this court. In his view, the proper position was set in the case of **Shose Sinare** (supra) which the respondent did not contest. He added that the way the Hon. Magistrate made his findings shows that the determination of the point required evidence this evidencing that the district court erred in sustaining the point of objection.

On the 2nd ground, Mr. Madeleka rejoined by maintaining similar arguments on the preliminary objection requiring evidence, thus not qualifying as an objection.

As to the 3rd ground, he contended that it was a misconception that where a party was not a party to a case, he or she could not file an appeal but a revision. He asserted that the right of appeal is a constitutional right with constitutional footing as covered under **Article 13 (6) (a) of the Constitution** as one of human rights. While appreciating that the case of **Jacquiline Ntuyabaliwe** (supra) is one of the sources of law (case law), he contended that where there is a conflict between constitutional law and case law, constitutional law supersedes. In the premises, he contended further that case law cannot oust the right of the appellant to appeal. To cement further on his point, he referred the trial court decision arguing that the same reads that the right of appeal is open to any person not satisfied with the decision of the court. He considered the said decision validly standing as it has not been quashed. Referring to the phrase "any person" in the trial court's judgement, he interpreted the same to be inviting any person involved or not involved.

Replying to the 4th ground, the learned counsel conceded with Mr. Stolla's argument that had the district court Magistrate determined the issue of illegality, the same would have amounted to a premature determination as she was resolving a preliminary objection. He however argued that what the Magistrate did was to interfere on the main application. Mentioning the case of **Ridhiwani Machambo** (supra) and **Ally Jabiri Sanza Kasambala** (not mentioned before nor copy supplied) allegedly cited by Mr. Stolla, he contended that though the cases are persuasive, they do not

bind this court. He further found the cases distinguishable because they concern parties in the lower court. In the matter at hand, he said, the appellant was not a party, but was affected by the acts of the respondent for not including him as a beneficiary in the deceased's estate.

Addressing the 5th ground, Mr. Madeleka first challenged Mr. Stolla's argument that the appellant in his grounds referred to "leave" and not "extension of time." He found the argument lacking base on the argument that whether it is "leave" or "extension of time" both phrases mean one thing which is "permission." In his view, the phrases were just semantics which cannot defeat justice.

He further agreed with Mr. Stolla that this court was only resolving an appeal and that is why the appellant's prayers were made under **Section 76 (1) (a) of the Civil Procedure Code**, which reads on the heading "General Provisions Relating to Appeals." He prayed that if the court finds the grounds meritorious, it grants the appellant all the reliefs prayed in his application in the district court as it has powers to determine the matter to finality.

I have observed the rival submissions of the parties as well as the record of both lower courts. It is evident from the record, as I indicated earlier in the brief facts of the matter, that this matter originates from uncontested probate cause before the trial court. The appellant herein sought for extension of time to appeal against the decision of the trial court. He had several reasons on why he intended to appeal. Mostly, the reasons challenged the

appointment of the respondent herein as the executrix. The application as stated by the parties was met with two points of preliminary objection being; one, that the appellant had no *locus standi* and two, that the affidavit was incurably defective. It was the 1st point of objection alone that was determined resulting into dismissal of the application.

Perusing the grounds advanced before this court, and the submissions thereof, I am of the view that they are all centred on two main issues being; **one**, whether the preliminary objection was on a pure point of law and rightly determined in the circumstances and **two**, whether the district court was wrong for not exercising its discretion to grant the appellant extension of time.

With regard to the 1st issue; at the district court, the preliminary objection in relation to the appellant's *locus standi* was based on two arguments. One, that the appellant was not a party to original proceedings and two, that the appellant had not displayed in his affidavit that he had interest in the deceased's estate as a beneficiary. This is displayed in both typed proceedings of the district court and its Ruling.

In fact, it is uncontested that the appellant was not a party to the original proceedings at the trial court. What is contested is whether given that the matter before the trial court was uncontentious, the appellant had the right to appeal thereby worthy of being granted the extension of time sought.

It is well settled that only a party to proceedings can appeal against the decision made by the respective court. As correctly argued by Mr. Stolla, the right to appeal is reserved to the parties alone. In that respect, where one is not a party to the original proceedings, but is aggrieved by said decision, he or she can seek for revision of the said decision to which he or she was not a party. This position has been well settled by the Court of Appeal in the case of **Isidore Leka Shirima & Another vs. The Public Service Social Security Fund & Others** (Civil Application No. 151 of 2016) [2021] TZCA 761 (18 October 2021) TANZLII, whereby it stated:

> "We agree with the applicants' assertion that they could not be joined in that appeal as they were not parties in the original matter sought to be challenged as was suggested by Mr. Mwakagamba. This is so because according to the case **Tanzania Ports Authority and Another,** (supra) it is only the Attorney General who has a right or could invoke the provisions of section 6 (a) of Act No. 4 of 2005 to apply to the Court to be joined as an interested party in the intended appeal in a case he was not a party in order to safeguard the Government interests as per the powers of the Attorney General …"

In an endeavour to evade application of the settled position under case law, Mr. Madeleka contended that the right of appeal is constitutional and so supersedes case law. I agree that the **Constitution of the United Republic of Tanzania, 1997** (as amended) does provide for the right to appeal. This is well seen in its wording under Article 13(6)(a), which states:

"13. (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

(a) when the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;"

In my considered view, the above cited provision does not mean that courts should blindly accord such right to parties without observing mandatory procedures of the law. The Constitution sets a framework whereby other laws have to be put in place to enhance implementation of the constitutional provisions. In fact, the provision does not provide for an absolute right to appeal to any aggrieved person, including those that were not parties to the original case. The Constitution charges the authorities to create procedures where one can challenge a decision, he/she is not satisfied with, which includes an appeal or any other procedure, such as revision depending on the circumstances of the claim.

In that respect statutory laws, both substantive and procedural, have been put in place to guide on such remedies. These substantive laws and procedures are there to enhance administration of justice thus should not be ignored. Facing an akin situation in **Millicent Mrema vs. ZANTEL** (Civil Appeal No.289 of 2020) [2023] TZCA 17466 (30 June 2023) TANZLII, whereby a party sought to impose the constitutional right to appeal as enshrined in the

cited provision without seeking leave to appeal to the Court of Appeal, the Court of Appeal stated:

> "We have, on our part, given due consideration to the parties' rival arguments on the point of objection. As our starting point we entirely agree with the appellant that right of appeal is a Constitutional right as enshrined under the cited Article 13 (6) (a) of the Constitution and procedural rules are handmaids of justice rather than mistresses of justice. But we are, however, not ready to go along with her that, procedural rules are of no essence and the Court has consistently maintained that constitutional provisions, notwithstanding their superiority, are not meant to disapply the rules which are crucial in the smooth administration of justice."

It is also well settled that an appeal is a creature of statute and in that regard, a party does not have to go far to search if such right exists. This was well expounded by the Court of Appeal in the case of **Jireys Nestory Mutalemwa vs. Ngorongoro Conservation Area Authority** (Civil Appeal 180 of 2016) [2023] TZCA 194 (21 April 2023) TANZLII whereby the Apex Court stated:

> "For a start, we find inevitable to state that it is trite law that an appellate jurisdiction of the court is a creature of a statute… To determine whether a right of appeal exists from an impugned decision one need not go further than the relevant statute."

The right to appeal to the district court from the decision issued by the primary court is provided under **Section 20 (1) (b) of the Magistrates' Court Act**, which states:

> "(b) in any other proceedings, any party, if aggrieved by an order or decision of the primary court, may appeal there from to the district court of the district for which the primary court is established."

In my settled view, the above provision clearly shows that the right to appeal is reserved only for parties to original causes and not any person outside the original cause who appears to be aggrieved by the decision thereof. In that respect, even the extension of time to appeal can only be sought by a party to the original cause. Mr. Madeleka argued that the phrase "any person" entails any person out there aggrieved by the decision. I find his argument misconceived as the provision does not invite "any person" including those not parties to the case to file an appeal. Such persons have other recourse to follow.

The Constitution which he relied on charges the courts with the duty to interpret the laws. In that respect, this court and the Court of Appeal, as seen in the cases above referred to, interpreted the provisions in relation to appeals by confining appeals to parties who litigated in the original suit. However, this does not mean that aggrieved third parties' rights have been shattered completely. They too have a remedy under the law, but not through appeal. It is through revision as already adjudged by this court and the Court

of Appeal. In that respect, I find the argument by Mr. Madeleka misconceived.

Mr. Madeleka further argued that the trial court in its decision stated that an aggrieved party had the right to appeal to the district court. In his view, as I have discerned, such remark by the trial court conferred the appellant the right to file an appeal in the district court, thus entitled to the extension of time sought. As I have already noted, the right to appeal is a creature of the statute. As such, the courts cannot grant such right.

The purported order by the trial court, if at all issued could not confer such right to appeal to any individual not a party to the probate cause including the appellant. Addressing a situation whereby the High Court granted a party the right to appeal while the statute did not accord the same, the Court of Appeal in **Tito Shumo & 49 Others vs. Kiteto District Council** (Civil Appeal Case 170 of 2012) [2013] TZCA 397 (4 March 2013), stated:

> "On this again, we hasten to say that we agree with learned counsel Mgongolwa that the right to appeal is a creature of statute. That being the case, the Court cannot validly grant such right where it has been expressly or impliedly denied. In the circumstances of our present case, the High Court had no power to confer the applicants the right of appeal which was not given by statute. That was absolutely invalid, hence of no consequence. For reasons we have given in this ruling, we are satisfied that the first ground of the

> preliminary objection that this Court is not properly moved is meritorious and we uphold it."

This matter having originated from uncontentious probate matter does not mean that the appellant is with right to appeal. Him being a beneficiary or person with interest in deceased property is immaterial to the matter at hand. Further, the district court did not have to address the question whether the appellant was beneficiary or had interest in the estate of the deceased. Such fact would in fact call for evidence which in fact, as argued by Mr. Madeleka, is not within the standard of a preliminary objection. However, the fact that the appellant was not a party to proceedings at the trial court sufficed to dispose the matter for he clearly lacked *locus standi*.

In the foregoing, I am of the firm view that the preliminary objection based on the claim that the applicant was not a party to the proceedings at the trial court was on pure point of law within the definition offered by the courts in **Shose Sinare** (supra); and **Soitsambu Village Council** (supra). Determination of the point of objection would only invoke evidence if the facts to that effect were not pleaded by the parties, which I find not being the case in this matter. In fact, the question of locus is matter of jurisdiction. In **Registered Trustees of SoS Children's Villages Tanzania vs. Igenge Charles & Others** (Civil Application No. 426 of 2018) [2022] TZCA 428 (14 July 2022) TANZLII, the Court of Appeal borrowed the holding from Malawi Supreme Court in the case of **The Attorney General**

versus Malawi Congress Party and Another, Civil Appeal No. 32 of 1996 whereby it was observed:

> "Locus standi is a jurisdictional issue, it is a rule of equality that a person cannot maintain a suit or action unless he has an interest in the subject of it, that is to say, unless he stands in sufficiently dose relation to it so as to give a right which requires prosecution or infringement of which he brings the action."

The Court of Appeal, subscribing to the said position proceeded to state:

> "In the premises, a person whose rights or right has been infringed by another person can seek before the court a remedy or relief either personally or through an authorised agent. Obviously, this is not the case on matters touching public interest litigation. In addition, **if a person who brings action has no locus standi this puts to question the issue of the jurisdiction which must be considered at the earliest, be it by the parties or the court itself**."

In that respect, I find that the district court rightly dismissed the application before it as it evidently lacked jurisdiction. Besides, it would have been a superfluous exercise to grant extension of time to the appellant for him to invoke a forum he was not entitled to. As correctly argued by Mr. Stolla, the appropriate remedy for the appellant was therefore to seek for extension of time to file revision or otherwise object against the respondent's appointment at the trial court. Of course, both options are subject to relevant circumstances and probate laws.

In consideration of my arguments as hereinabove, I find the 2nd issue as to whether the district court was wrong for not exercising its discretion to grant the appellant extension of time dismantled, especially with the fact that the preliminary objection was sustained by the district court. Even if this court would have found the district court erred in sustaining the 1st point of objection, the only remedy this court would have offered is to remit the case file to the district court for it to determine the other point of preliminary objection and or the application before it. This is because, the appellate court can only resolve matters determined by the court before it as it lacks jurisdiction otherwise on matters not determined.

In the upshot, the appeal is found to lack merit and consequently dismissed, with costs.

Dated and delivered at Moshi on this 05th day of June, 2024.

X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA