

**IN THE HIGH COURT
OFTANZA NIA (DAR ES
SALAAM DISTRICT
REGISTRY) AT DAR ES
SALAAM**

PC CIVIL APPEAL NO. 116 OF 2004

**IN THE MATTER OF PRELIMINARY OBJECTION
AGAINST THE APPEAL**

DANIEL F. MACHUMBE

.....
APPELLANT

VERSUS

JOSEPH F. MACHUMBE

.....
RESPONDENT

RULING

SHANGWA. J:

On 7th October, 2004 Learned Counsel for the Respondent Mr. Matumla presented a notice of intention to argue a point of law before hearing P.C. Civil Appeal No.116 of 2004 which was filed in this court against the decision of the District Court of Kinondoni in Misc. Civil appeal No. 16 of 2002.

He indicated that his notice is being brought under 0 XXXIX r 33 of the Civil Procedure Code, 1966 which gives over to the High Court to pass any order in favour

of the respondent which ought to have been made by the lower Court even where the respondent has not filed an appeal or raised objection.

The point which he intended to argue by way of his notice is whether it was proper for the Primary Court of Kinondoni to entertain the Proceedings in Probate and Administration Cause No. 174 of 2001 and whether it was proper for the District Court of Kinondoni to entertain the proceedings in Misc. Civil Appeal No.16 of 2002. This court gave him opportunity to argue this point and he presented his arguments in writing.

Essentially, he is saying that the matter which was filed by the appellant in the Primary Court of Kinondoni was time barred and that the appeal in the District Court of Kinondoni from the decision of the Primary Court of Kinondoni in the same matter was also time barred. He prayed the court to nullify the proceedings in the courts below

I have gone through the proceedings in the District Court of Kinondoni and found that the learned Counsel for the respondent Mr. Matumla raised a preliminary objection to the appeal before it in which a similar point of law was raised and overruled in the interests of justice.

In overruling this point of law, the learned Senior District Magistrate A. Wambura held inter-alia that the parties are brothers and that the dispute between them concerns property which was left by their father Frederick Athanas Machumbe who died in 1983.

This property is a piece of land on which their father had built a mud house which was demolished by the respondent who took it over at the expense of other heirs even before he was appointed as administrator of their father's estate.

Learned Counsel for the appellant, Mr. Msafiri

submitted that the respondent's notice of intention to argue the relevant point of law before this court is misconceived, untenable and incompetent and that therefore it should be struck out with costs.

He contended that the point of law raised by the respondent in his notice is arguable in a cross-appeal which is not before this court.

I think Mr. Msafiri is right in his contention. Mr. Matumla was supposed to file a cross-appeal against the decision of the District Court of Kinondoni. Instead of doing so, he decided to notify the court that he has a point of law to argue which point appears to have been intended to defeat the appellant's appeal without hearing it.

As I have already stated, his point of law was raised in form of a preliminary objection and was argued in the District Court of Kinondoni which

overruled it. In a way, this fact enriches Mr Msafiri's contention that the respondent ought to have filed a cross-appeal against the decision of the District Court of Kinondoni. I think also that, he could have as well filed revisional proceedings against the District Courts' proceedings and the decision thereon.

I therefore strike out his notice and dismiss his arguments with costs.

**A.
Shangwa
JUDGE
4/3/2005**

Delivered in open Court this **4th** day of March,
2005

**A.
Shangwa
JUDGE
4/3/2005.**