

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL APPEAL NO. 23 OF 2020

(Appeal from Ruling of the District Court of Rombo at Mkuu, in
Miscellaneous Civil Application No. 4 of 2020)

ALBERT ELIGI SHIRIMA ----- APPELLANT

VERSUS

KIZITO ELIGI SHIRIMA ----- RESPONDENT

JUDGMENT

MUTUNGI .J.

The appellant herein has filed the present appeal premised on one ground. The same is as hereunder: -

“That the trial Magistrate misdirected himself by granting an application for extension of time without sufficient reasons.”

Before dwelling on the merits or otherwise of the appeal it is imperative, the genesis of the matter be stated on the outset.

The respondent herein had filed a probate matter christened no. 10/2015 before the Mengwe Primary Court at Rombo. The trial court did deliver its decision to his dissatisfaction, hence he proceeded to file for extension of time to file his intended appeal out of time against the said decision vide Application No. 4 of 2020 before the District Court of Rombo. Having deliberated on the grounds/reasons for extension, the District Court Magistrate proceeded to grant the same. It is upon such grant that the appellant has now come through the window of appeal before this court, to look into the reasons given by the District Court. His ground of appeal is formulated to cater for his grievances against the said decision.

When the appeal was called up for hearing the parties prayed the same proceeds by way of written submissions. The appellant on the offset associated himself with the principle established in the case of **Lyamuya Construction Company Ltd. vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Appeal No. 2 of 2010 (unreported)** elaborating factors to be relied upon by the courts in granting extension of time. He further contended that the reason that the respondent was not issued with a

copy of judgment on time by the trial court (Primary Court) was not a good reason in itself nor was it sufficient.

Be as it may, the reason that the parties are siblings of the same father and mother is not supported by the various authorities sounded by the Superior Courts of this land. The courts below have been strongly advised in such applications, they are to apply their discretion which should be exercised according to the rules of reason and justice and not according to private opinion or arbitrarily. In his settled opinion once the respondent had failed to adduce sufficient reasons, the court ought to have dismissed the application.

Responding to the appellant's submission, the respondent argued in essence he had adduced strong reasons in support thereof. The court had formed an opinion and rightly so, in the circumstances of the case, the best way forward was to grant an order for extension. The same was in view of the fact that, this being a probate matter raises very sensitive issues. These call for a proper handling to avoid serious differences from blood brothers who supposedly are entitled to enjoy the estate in issue as heirs of the deceased parents.

It was the respondent's further argument that the word **“sufficient reasons”** should receive a liberal construction as laid down in the case of **Daphne Parry vs. Murray Alexander Carson [1963] EA 546**. He went further to elaborate the **Lyamuya's case (supra)** cited by the appellant was decided before the advent of the overriding objective principle. In support thereof, the respondent invited the court to the holding in the case of **Jakobo Magoiga Gichere vs. Peninah Yusuf, Civil Appeal No. 55 of 2017, (CAT-unreported)** which emphasized the importance of giving due consideration to substantive justice and not technicalities during dispensation of justice. In that regard the District Court Magistrate was of a strong belief, the parties herein would settle their conflicts or issues through the intended appeal once the respondent was granted time to file the same. This is the reason the District Magistrate had gone to the extent of referring to a “reasonable man” and proceeded to weigh merits and demerits of granting or otherwise the extension of time to the respondent. The appellant now claiming and raising his voice that, the court had no justifiable reasons to grant extension of time only leads to the abuse of the court's discretionary powers and procedures.

In the upshot, the respondent prayed the appeal be dismissed for lack of merits.

In rejoinder, the appellant reiterated his earlier position with an addition that, the position of the court as regards the application of the principle of overriding objective is, it should not be invoked blindly in every instance where there is a breach of the provision of the law that requires compliance in mandatory terms.

Having synthesized the foregoing summary from the respective submissions, it is imperative to underscore that the respondent had approached the District Court following his dissatisfaction with the decision delivered by the trial court (Mengwe Primary Court), Probate Cause No. 10/2015. Having found himself out of time to file his intended appeal, he filed an application seeking to be granted extension of time to file the same. He attributed the delay of filing his intended appeal to the failure by the trial court to avail him a vital appeal document to wit was the copy of the disputed judgment. He had immediately after the judgment was delivered (5/12/2016) applied to be supplied with the copy of decision on 6/12/2016. Despite a serious follow up he was

issued with the same on 18/1/2017. He attempted to file his intended appeal which was struck out on 12/3/2019 for being out of time. In view thereof he filed an application for extension which was granted. It is in respect of the grant of the extension for the respondent to file his intended appeal that, the appellant has now come before this court through the window of appeal.

The law governing appeals from the Primary Court to the District Court is provided for under **Section 20(3) of the Magistrates Court Act, Cap 11 R.E. 2019**. The same sets out, one is to appeal within 30 days after the decision subject to be challenged. Reading between lines, it is not a mandatory requirement under the said provision that an appeal to the District Court is to be accompanied with a copy of judgment. There is a basket full of authorities on this aspect, one among these being the case of **Hamis Ismail Mlaganile vs. Rukia Juma, Civil Appeal No. 27 of 2015 (unreported)** where inter alia it was held;

“Any plea of late supply of copies of judgment and proceedings for the purpose of constructing sound grounds of appeal is unmeritorious, for matters originating from

Primary Courts the annex of such copies is not one of the legal requirement."

Coming back to the appeal at hand, the District Court Magistrate did concur with the appellant's submission that the reason advanced by the respondent (late supply of the copy of judgment) was not a good reason but went on to grant the prayer sought. The Honourable District Magistrate admitted that she was moved out of necessity to do so on two reasons. She quickly though judged herself, she was to sound what she termed **"awkward"**. For the sake of reference the District Magistrate had the following at page 5 to say;

"The applicant and respondent are siblings same father and mother who are now lates despite them being older men now they have families who observed all the battle and that means even in demise of one their children will carry this forward and that insinuated that this will never end."

Further at the same page the Honourable Magistrate is quoted as having stated;

"The issue between then is probate and administration believing that there is an estate to be enjoyed by all as heirs of the deceased parents, probate issues are very sensitive and if mishandled may result into exceedingly trouble."

It is surprising as to how the Honourable Magistrate was carried away by sympathy and assumptions despite her awareness of the law in such situations. The Honourable Magistrate did find and rightly so at page 5 of her judgment that: -

"Even though the applicant got no sufficient cause, didn't act diligently, and didn't disclose any point."

Reading from the above, it is obvious she had in mind the principles established in the case of **Lyamuya (supra)** in which factors laid down to be relied upon by the court in granting extension of time include: -

- (a) The applicant must account for all the period of delay.
- (b) The delay should be inordinate.

(c) **The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.**

(d) If the court feels that there are other sufficient importance, such as the existence of a point of law of sufficient importance such as the illegality of the decision sought to be challenged.

This court is of a settled firm view, the District Magistrate should have complied to the dictates of law that one is to adduce sufficient reasons in the same line she had reasoned in the Ruling. The fact that she had found no sufficient reasons adduced by the respondent, it was a serious error for the Honourable Magistrate to grant the extension of time on the basis of “**awkward**” reasons already stated earlier. The courts are not courts of sympathy but courts of law and legal procedures. On a wider spectrum it would seem she was indirectly applying the overriding objective principle to the application. With due respect to the Honourable Magistrate I would venture to say, the said principle had no room in the present scenario where the law is loud and the guidelines have been provided for. The court ought to have dismissed the application as properly submitted by the appellant.


All said and done, this court allows the appeal and proceeds to quash the Ruling of the District Court and is set aside with no costs. The parties are to proceed where they ended in Probate and Administration Cause no. 10/2015 at Mengwe Primary Court.


B. R. MUTUNGI
JUDGE
28/5/2021

Judgment read this day of 28/5/2021 in presence of both parties.


B. R. MUTUNGI
JUDGE
28/5/2021


RIGHT OF APPEAL EXPLAINED.


B. R. MUTUNGI
JUDGE
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