

THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MOROGORO SUB-REGISTRY)

AT MOROGORO

PROBATE APPEAL NO. 15 OF 2022

*(Arising from Civil Revision No. 2 of 2022, in the District Court of Kilombero, at Ifakara;
Originating from Probate and Administration Cause No. 22 of 2020 at Ifakara Urban
Primary Court).*

WOLFGANG Z. NGALAPA..... APPELLANT

VERSUS

**CONRAD ZACHARIA NGALAPA (Administrator of the Estate of the
Late ZACHARIA CONRAD NGALAPA).....RESPONDENT**

RULING

31st March & 28th June, 2023

CHABA, J.:

This ruling stemmed from the preliminary objection (P.O) raised by the respondent against the appellant's petition of appeal that, the appeal filed in this Court on the 25th day of November, 2022 contravened the mandatory law, to wit; section 25 (3) of The Magistrates' Courts Act [CAP. 11 R. E, 2019] and Rule 5 (3) of The Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules GN. No. 312 of 1964, hence incompetent and unmaintainable. In the petition of appeal before this Court, the

appellant sought to challenge the decision (ruling) of the District Court of Kilombero, at Ifakara in Civil Revision No. 2 of 2022 that was delivered on the 27th day of October, 2022. In its ruling, the District Court dismissed the Appellant's Application for Revision No. 2 of 2022 for want of merits and proceeded to uphold the decision of the Ifakara Urban Primary Court, at Ifakara in Probate and Administration Cause No. 22 of 2020.

According to the Court record, the appellant's petition of appeal was prepared and filed by the Learned Advocate Mr. B. L. Tarimo who also entered appearance on behalf of the appellant. On the other hand, the respondent appeared in person, and unrepresented though he engaged the Learned Advocate, Mr. Funuki Sikujua only for arguing on the point of preliminary objection through written submissions. By consensus of both parties, leave of the Court was sought and granted to the effect that, the application be disposed of by way of written submissions. In this regard, the respondent's written submission in chief was supposed to be filed on or before 14th February, 2023, whereas the appellant's reply to written submission in chief had to be filed on or before 20th February, 2023 and the respondent's rejoinder had to be filed in Court on or before 24 February, 2023.



Submitting in support of the point of preliminary objection, Mr. Funuki, the learned advocate on behalf of the respondent contended that, the appeal before this Court was improperly filed because it ought to have been firstly filed at the District Registry instead of being filed direct at the Registry of the High Court of Tanzania as done by the appellant's advocate. Mr. Funuki referred this Court to the provision of section 25 (3) of The Magistrates' Courts Act [CAP. 11 R. E, 2019] and Rule 5 (3) of The Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules GN. No. 312 of 1964. He submitted that, since the above cited provisions of the law are coached in mandatory terms, it follows therefore that, the remedies available on these procedural irregularities is to struck out the appeal in its entirety. To support and strengthen his contention, Mr. Funuki availed this Court with the copy of the ruling of my Learned Sister, M. Mnyukwa, J., who faced a similar situation while dealing with the case of **Edward Mrugusi Vs. Enos Hangi Masalu**, PC. Civil Appeal No. 50 of 2021 HCT at Mwanza.

To end up his submission, the counsel prayed the Court to uphold the decisions of the District Court and the trial Court and further issue an Order for dismissal of the instant appeal with costs.



In reply to the above submissions, Mr. Tarimo, Learned Advocate conceded to the raised preliminary objection to the effect that, the instant appeal was wrongly filed in this Court and that it was supposed to be filed at the District Registry. For ease of reference, I will quote what the learned advocate stated while submitting on this facet: -

"We feel obliged to concede with the Appellant's Counsel that, the appeal was supposed to be filed in Kilombero District Court and not in the High Court, Morogoro District Registry as it stands now".

Mr. Tarimo proceeded to pray for extension of time to file the appeal in the respective registry at Kilombero District Court.

In rejoinder, the counsel for the respondent strongly resisted the appellant's prayer for extension of time. He accentuated that, in the circumstance of this case, the prayer for extension of time lacks merit as there is no suit for extension of time before this Court.

Having summarized the rival submissions by the parties and upon managed to venture through parties' submissions and the Court record, it is undisputed fact that the counsel for the appellant right away conceded that,

the instant appeal is incompetent before this Court and it suffices to suffer a natural death by being struck out from the Court registry. Under section 25 (3) of The Magistrates' Courts Act [CAP. 11 R. E, 2019], the law clearly states that: -

"Section 25 (1) - Save as hereinafter provided: -

(a) NA

(b) NA

(2) NA

(3) Every appeal to the High Court shall be by way of petition and shall be filed in the district court from the decision or order in respect of which the appeal is brought:

Provided that, the Director of Public Prosecutions may file an appeal in the High Court and, where he so files an appeal, he shall give notice thereof to the district court and the district court shall forthwith dispatch the record of proceedings in the primary court and the district court to the High Court".

(4) Upon receipt of a petition under this section the district court shall forthwith dispatch the petition, together with the record of the proceedings in the

primary court and the district court, to the High Court.

[Bold is mine].

From above provisions of the law, it is clear that an appeal to the High Court emanating from Primary Court, shall be by way of petition and has to be filed at the District Court whose decision is the subject of the appeal. Upon receipt of a petition, it is the duty of the District Court to dispatch the petition together with the record of the proceedings of both Lower Courts to the High Court.

In a nutshell, the rationale behind the provision is to facilitate and speed up the process of appeal originating from the Primary Court by avoiding the unnecessary delay in calling the records of proceedings from the Lower Courts. **[See: Edward Mrugusi Vs. Enos Hangi Masalu** (supra) at page 7 to 8]. Additionally, as rightly submitted by Mr. Funuki on behalf of the respondent, appeals in the District Court and High Court for matters originating from Primary Courts are governed by the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, Government Notice No. 312 of 1964) providing for among many other things, the form and content of the appeal (Rule 4), and registration of appeal (Rule 5).

As regards to the prayers advanced by the counsel for the appellant for extending time to file the appeal in the respective registry at Kilombero

District Court, in my considered opinion, at this juncture, this Court has no jurisdiction to entertain such an argument as an alternative to the incompetent appeal. Since Mr. Tarimo does not object the fact that, the present appeal is unmaintainable in law, he is in law, as an officer of the Court, precluded from inventing any wheel of moving the Court based upon incompetent appeal or even an application.

For the above reasons and based on the above cited laws, I therefore agree with both parties that, this appeal is incompetent before this Court. Accordingly, I proceed to struck it out with costs. **I so order.**

DATED at MOROGORO this 28th day of June, 2023.




M. J. CHABA

JUDGE

28/06/2023