

IN THE HIGH COURT OF TANZANIA
(IN THE DISTRICT REGISTRY)
AT MWANZA

PC PROBATE APPEAL No. 11 OF 2021

*(Arising from Misc. Civil application No. 04/2021 and originated from the
Probate Appeal No. 19 of 2020)*

JULIANA MAGESA ----- APPELLANT

VERSUS

SINGI MAGESA ----- RESPONDENT

JUDGMENT

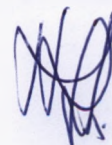
Last Order date: 20.09.2021

Judgment Date: 29.09.2021

M. MNYUKWA, J.

The Appellant Juliana Magesa appealed against the decision of Nyamagana District Court at Mwanza in Misc. Civil Application No. 04 of 2021 which was dismissed.

The background of this appeal was that, the Respondent Singi Magesa on 23.07.2020 filed a probate case No. 127 of 2020 and petitioned for letters of administration of the Estate of the late Veronica Nkondo before Mwanza Urban Primary Court. After the citation was issued, on 28.07.2020 the appellant Juliana Magesa objected for the appointment of the respondent. The trial court registered the objection and scheduled it



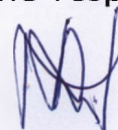
for hearing whereby on 21.08.2020 the trial court found that the objector failed to prove her objection and dismissed the objection. The trial court proceeded to the hearing of the petition by the applicant and on 24.08.2020, the respondent was duly appointed to be the administrator of the estate of the late Veronica Nkondo.

Aggrieved, the appellant on 21.09.2020, filed a Probate Appeal No. 19 of 2020 before Nyamagana District Court. When the matter was called for hearing, on 09.10.2020, the respondent filed a preliminary objection that the appeal was unattainable and the appellant lacked locus stand to appeal against a decision which she was not a party to it. The hearing of the preliminary objection was scheduled in several dates and later on the appeal was dismissed for want of prosecution.

Dissatisfied, on 13. 01. 2021, the appellant filed before Nyamagana District Court Misc. Civil application No. 04 of 2021 prayed the court to set aside a dismissal order and restore the appeal. The application was determined on merit and the same was dismissed on 09. 04. 2021.

The appellant did not see justice and approached this Court appealing against the decision of Nyamagana District Court vide HC. PC. Probate appeal No. 11 of 2021 with two grounds of appeal thus: -

- i. That the trial magistrate grossly erred on point of fact and law by delivering his decision in favour of the respondent by mere



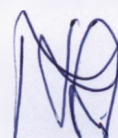
considering the hearsay evidence that the appellant failed to attend the court because she was attending another court case.

- ii. That, honorable trial magistrate erred by not considering that the respondent failed to serve the appellant his submission in order to prepare her rejoinder.

Pursuant to the court order dated 21 08.2021, the matter was argued by way of written submissions where parties complied. The appellant was represented by Mr. Alex Lwoga learned counsel and the respondent afforded the services of Mr. Akram Adam Learned advocate.

Submitting on the 1st ground of appeal the appellant stated that when the Probate Appeal No. 19 of 2020 was scheduled for hearing on 16/12/2020, the appellant was sick and admitted to the hospital since 5/12/2020. She went on presenting her medical sheets to prove her claim. She also avers that on the day fixed for hearing, she sent a person to notify the court on her whereabouts but she was not considered by the court. In addition, she further submitted that she had never missed to attend her case when it was fixed for hearing by the court except on 16/12/2020.

She insisted that the respondent's assertion before the trial court that on the day when the application was dismissed the appellant was present in court premises attending another matter but failed to mention

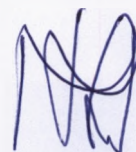


the case number and the magistrate presiding over the case is a wrong assertion. She insisted that the trial court failed to consider the appellant's evidence and prays this court to allow the appeal.

On the second ground of appeal, she claims that she was never served with the respondent's reply to the written submissions to enable her to file rejoinder hence denied the right to be heard.

Responding to the appellant's submissions, the respondent learned counsel started to address the first ground of appeal. He avers that the trial court was right to dismiss the application for the reasons that the appellant failed to prove that she was at a material time hospitalized as claimed. Referring to the medical sheets produced as exhibit, the appellant was examined on 5/12/2020 and it is not shown that she was hospitalized. For those reasons, she prays the appeal to be dismissed.

On the second ground of appeal, it was the respondent reply that the appellant was present to the court premises attending to another case presided over by the same magistrate and therefore, the trial magistrate took a judicial notice. Responding to the issue of attendance, the respondent insisted that the appellant was regularly absent as it can be reflected from the court's proceedings.



After the rival submissions by the learned counsels, I now stand to determine the appeal and the central issue for consideration and determination is whether the appeal before me is meritorious.

Before determining the merit of appeal as per the submissions by learned counsels, I must bring to attention that the right to be heard is a constitutional right provided for under Article 13(6)(a) of the United Republic of Tanzania Constitution. That parties must be afforded an opportunity to defend their suits but subject to the adherence to the required procedures. The genesis of this appeal was a result of the dismissal order on the Probate Appeal No. 19 of 2020 and the failure to set aside the said Order on Misc. Application No. 04 of 2021.

Contextually, the appeal before me emanates from the Misc. Application No. 04 of 2021. It is my view that the appeal was supposed to be registered as Misc. Probate Appeal No. 11 of 2021 instead of the PC Probate Appeal No. 11 of 2021. Despite of that defect irregularity I proceed to determine the appeal on merit because the said defect does not go into the root of the matter.

With due respect, in the present appeal the learned counsels seems not to act diligently on the matter for reasons known to themselves. This is because the appellant's submissions mainly focused on sickness as reason which resulted the appellant to have failed to attend the court on

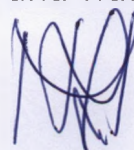


the day when her case was dismissed for want of prosecution but the same was not clearly seen on the grounds of appeal.

The respondent did not respond to the second ground of appeal instead he formed his own second ground and responded to it.

Coming back to the appeal, on the first ground of appeal it was the appellant's claim that the trial court erred in delivering its decision in favor of the respondent based on the hearsay evidence. The appellant managed to annex to her sworn affidavit medical sheets dated 5th and 7th December 2020 respectively issued to the appellant by Prinmat Maternity Home. The medical sheets were objected by the respondent on the reason that the same did not show if the appellant was hospitalized. The trial court conceded with the argument of the appellant that sickness is among of the reasons for setting aside a dismissal order, but he went on to argue that the appellant failed to prove that the person purported to have been hospitalized at Prinmat Maternity Home was the appellant.

As I perused the records, I go through the medical sheets to ascertain what was claimed by both parties. What is on records is that, on 05.12.2020 the patient by the name of Juliana Magesa Mhoja was attended to a laboratory test and on 07.12.2020, the same patient one Juliana Magesa Mhoja was diagnosed to have incomplete abortion and was given ED to take a home rest for two weeks and was to return to the



hospital on 21.12.2020. On my perusal, I came to find that the patient named Juliana Magesa Mhoja is the appellant. Again, in the trial court records, I found that Probate Appeal No. 19 of 2020 before Nyamagana District court was dismissed on 16.12.2020 the time within which the appellant was covered by the medical sheets.

Referring to the principle stated in the case of **Shembilu Shefaya vs. Omary Ally** [1992] TLR 245, where it was stated that where sickness is relied on as a reason, there must be elaborate explanation in the affidavit the extent which sickness prevented the litigant from taking a step to the court.

In our case at hand, the appellant presented two medical sheets, unfortunately enough neither of the medical sheet shows that the appellant was admitted to the hospital and surprisingly one of the sheet shows that the appellant was discharged.

On the sworn affidavit in Misc. Civil Application No. 04 of 2021, the appellant stated that she got sick on the material date that's on 16/12/2020. Again, on this appeal, at page 2 paragraph 1 of the appellant's written submission, she submitted that she was sick and admitted to the hospital since 05.12.2020. I find these two assertions do not tally and I revisit the medical sheets annexed on the sworn affidavit and relied upon, which has another version which reads "*ED- to patient 2*

weeks to rest at home and come to hospital 21.12.2020". This contradicting information raise doubts as what actually transpires, that either the appellant fall sick on 16.12.2020, or she was admitted to the hospital from 05.12.2020 as claimed on her written submissions or diagnosed and discharged for two weeks as stated on the medical sheet dated 7/12/2020. For what is on records, the explanation as to the sickness and the extent it prevented the appellant to attend her case is contradictory and therefore unreliable.

In addition to her submissions, the appellant's claimed that she has never missed any court date when the matter was fixed for hearing except on 16/12/2020. It is indeed a factor for consideration in dismissing the case, based on the previous attendance. In order to make determination based on the appellant previous attendance as claimed, I go through the court records and I find what is claimed by appellant is not reflected in the court records. The court records in Probate Appeal No. 19 of 2020 are clear that it was called 10 times before it was dismissed on 16 12.2020 for want of prosecution. It is reflected on records that the appellant was absent consecutively 7 times from 09.11.2020, 23.11.2020, 2.12.2020, 08.12.2020, 14.12.2020, 15.12.2020 and on 16.12.2020 when the case was dismissed. Therefore, it is not true that the appellant was always present when the matter was fixed for hearing.



Furthermore, the appellant's allegation that the trial magistrate delivered his decision in favour of the respondent by mere considering the hearsay evidence that the appellant failed to attend the court because she was attending another case, I find it to be misplaced. I am saying so because the trial magistrate though at page 3 of the trial court's Ruling noted the submissions of the respondent on that issue but he did not make any finding on that issue. When referring to page 5 and 6 of the same Ruling, the trial magistrate centered on determining whether the appellant had adduced sufficient cause to warrant the setting aside of the dismissal order. The only reason pointed out by the learned magistrate to dismiss the application was because the appellant failed to prove that she was sick on the day when the matter was dismissed.

Again, the records are silent on the appellant's assertion that on a day when her appeal was dismissed, she sent a representative to notify the court on her whereabouts but the same was not considered by the court. In this assertion I would like to comment that court records are believed to be accurate and therefore trusted. As it was rightly held by the Court of Appeal in the case of **Alex Ndendya v R**, Criminal Appeal No 207 of 2018, CAT at Iringa (unreported) that court record is always presumed to accurately represent what actually transpired in court.



Therefore, it is my considered view that the appellant's submissions are lacking some truth.

On the second ground of appeal, the appellant alleged that the trial magistrate erred by not considering that the respondent failed to serve the appellant his reply to the written submission in order to prepare her rejoinder. I find this ground to be an afterthought because having seriously going through the records of the Misc. Civil Application No 4 of 2021, I find the appellant was ordered to file written submission in chief on 16.03.2021, respondent to file reply to written submissions on 22.03.2021 and the appellant to file rejoinder (if any) on 26.03.2021 and the case was fixed for mention on 29.03.2021. On that date when the case was coming for mention, the appellant was present and she did not inform the court that she was not served with the reply to written submissions by the respondent to enable her to file the rejoinder. Again, the case was scheduled for Ruling on 9.04.2021 in the presence of the appellant and on that day the appellant was present in court and she stated that "I am ready for Ruling" without informing the court that she was not served with the reply to the written submissions in order to enable her to file rejoinder. It is my considered view that, it is not healthy as far as the proper administration of justice is concerned, to raise this ground at this juncture.



In the final analysis, I hereby find the appeal has no merit and the same is dismissed. I will not make an order as to costs because this is the probate case in which the parties are relatives.

It is so ordered.

Right of appeal to the parties are fully explained and guaranteed.



M. MNYUKWA
JUDGE
29/09/2021

Judgment delivered via audio teleconference whereby all parties were remotely present.



M. MNYUKWA
JUDGE
29/09/2021

