

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 5 OF 2016

THERESIA MAHOZA MGANGA APPLICANT

VERSUS

THE ADMINISTRATOR GENERAL (RITA)RESPONDENT
(Application for revision from the ruling of the High Court of Tanzania
at Dar es Salaam)

(Shangwa, J.)

dated the 16th day of December, 2012
in

Civil Case No. 85 of 2015

RULING

17th May & 21st July, 2016

MWARIJA, J.A.:

In this application the applicant is seeking the following orders:-

"1. That this honorable Court be pleased to grant extension of time within which to file written submission in support of the Notice of Motion in Civil application No. 85 of 2015.

2. And for an order that the costs of and incidental to this application be provided for."

On 17/05/2016 when the matter was called on for hearing, the applicant was represented by Mrs. Magdalena Rwebangira, learned counsel while Mr. Reginald Makoko, learned State Attorney appeared for the respondent. Mrs. Rwebangira had filed her written submission in support of the application in compliance with Rule 106 (1) of the Rules. On its part however, the respondent who was duly served with a copy thereof, did not file a reply to the applicant's written submission as required by sub-rule (8) of Rule 106. For that reason, hearing had to precede **ex-parte** under Rule 106 (10) of the Rules.

Submitting in support of the application, Mrs. Rwebangira argued that the delay in filing her written submission in support of Civil Application No. 85 of 2015 was due to the fact that she was involved in matters relating to constitutional review process between October, 2013 and 4th October, 2014. According to her submission and the affidavit, by virtue of her position as the Chairman of the Gender Forum on Constitution, Tanzania Women Parliamentarian Advisor on Constitution Advocacy and a member of the Legal and Human Rights Centre's Committee on Constitution, she was out of her chambers between October and December, 2013 collecting and consolidating views necessary for the

constitutional review process. In January 2014, she was appointed a Member of the National Assembly which was constituted in Dodoma from 18/02/2014 to 4/10/2014.

The learned counsel argued that due to these assignments, coupled with the incidence in which two advocates left her office, she failed to file the written submission within time. She also based the application on other two grounds: **Firstly**, that the decision appealed against consists of illegalities. She stated the nature of the illegalities as follows:

"... The ruling of the High Court contain averments and statements which are clearly misinterpretation of the Law of Marriage Act, 1971 and the Probate and Administration of Estates, Cap. 352 ... statements like the legal heirs of the deceased's estate are those children who used to call him "Baba" (page 9 of the ruling) have no legal basis and can be misleading in subordinate courts where most probate cases are handled and the authority of the High Court is binding."

Mrs. Rwebangira referred also to the part of the decision where, she said, the learned High Court judge equated cohabitation and divorce with legal marriage and separation respectively. She stated as follow;

"Moreover, the said ruling again with due respect equates, cohabitation synonymously with legal marriage, divorce with separation in my humble view these misinterpretations border illegality in the sense that it flauts the law and mislead not only the public but also unduly binds the subordinate courts..."

Relying *inter alia* on the decision in the case of **Transport Equipment Ltd v. D.P. Valambhia** (1993) TLR 9, the learned counsel argued that the application should as well, be grated on that ground.

Secondly, Mrs. Rwebangira relied on the fact that the applicant is getting legal assistance in the appeal and that the assigned brief was for that matter, a personal assignment to the learned counsel. Furthermore, she argued, at the time when she was assigned the case, she was the only advocate in her chambers who qualified to appear before this Court. She submitted therefore, that since the failure in filing the submission was due

to the factors beyond her control, the court should consider to grant the application.

In deciding the application, I intend to consider first, the ground based on allegation of illegality of the decision, which is the subject matter of the appeal and for which, the written submission is intended to be filed. As submitted by Mrs. Rwebangira, allegation of illegality of a decision is a good cause for grant of extension of time. In the case of **Transport Equipment Ltd v. D.P. Valambhia** (1993) TLR 9, the Court stated as follows:

"When the point at issue is one alleging illegality of the decision being challenged, the Court has a duty even if it means extending the time for that purpose to ascertain the point and, if the alleged illegality be established to take appropriate measures to put the matter and the record right."

The contention by the learned counsel in this application is that apart from misinterpretation of what a legal marriage entails under the Law of Marriage Act [Cap. 29 R.E. 2002], the learned High Court judge declared

that a child born out of wedlock is entitled to inherit from his father and that paternity can be proved on the basis of the evidence that a child used to call the deceased "Baba" (father).

In my considered view, the allegation of illegality of the challenged decision raised by the learned counsel for the applicant needs to be addressed. The issue can be properly dealt with if written submission is filed. Under Rule 106 (9) of the Rules, where written submission is not filed, the appeal may be dismissed. Since, therefore, according to the authorities cited above, allegation of illegality is a good cause for granting extension of time, the finding on that ground suffices to dispose of this application. For this reason, the application is hereby allowed. The applicant is hereby granted extension of time to file written submission as prayed. The same should be filed within fourteen days from the date of this ruling.

Each party shall bear its own costs.

DATED at **DAR ES SALLAAM** this 12th day of July, 2016

A.G. MWARIJA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


T.K. Simba
DEPUTY REGISTRAR
COURT OF APPEAL