

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 509/01 OF 2018

CHIKU HARID CHIONDA APPLICANT

VERSUS

GETRUDE NGUGE MTINGA as Administratrix of
The late YOHANE CLAUDE DUGU RESPONDENT

**(Application for Extension of Time for filing an Application for Revision of the
decision of the High Court of Tanzania, at Dar es Salaam)**

(Muruke, J.)

dated the 17th day of November, 2017

in

PC Civil Appeal No. 84 of 2016

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RULING

22nd July & 5th September, 2019

KOROSSO, J.A.:

Before me is an application for extension of time within which to file an application for revision of the Judgment of the High Court of Tanzania Dar es Salaam mentioned above in PC Civil Appeal No. 84 of 2016. The application is made by way of notice of motion supported by an affidavit deponed by Chiku Harid Chiondo the applicant, pursuant to Rule 10 and 48(1) of the Tanzania Court of Appeal Rules 2009 as amended by GN No. 362 of 2017 (the Rules). The respondent duly filed the Affidavit in Reply

sworn by Getrude Nguge Mtinga. Neither of the parties filed written submissions.

Before proceeding any further I find it pertinent at this interval to spell out albeit briefly the background to this application. The respondent was on the 18th of February 2015 appointed the administratrix of the estate of Yohane Claudio Dugu who died interstate on 14th November 2014. The applicant came forward seeking to be included as one of the beneficiary of the estate of the deceased claiming to be a wife of the deceased. At the Primary Court, Morogoro Urban, in Probate Cause No. 22 of 2015, the applicant was disqualified from being amongst the beneficiaries, the court refusing to recognize her as a legal wife of the deceased.

Being aggrieved by the said decision, the applicant appealed to the District Court of Morogoro in Civil Appeal No. 31 of 2016 where the court set aside the decision of the primary court stating that the applicant was a wife of the deceased and thus one of the heirs of the deceased properties. The respondent was dissatisfied with the decision of the District Court and appealed to the High Court. The High Court dismissed the appeal, subscribing to the findings of the 1st appellate court and ordered that the applicant be given share of the properties of the deceased from 2006 to

2014 acquired during the period the applicant cohabited with the deceased.

On the day the application came for hearing, the applicant was unrepresented and thus fending for herself while on the part of the respondent she was represented by Mr. Melkior Sanga, Learned Advocate. The applicant did not have much to submit and prayed that the contents of the notice of motion and the supporting affidavit be considered in determination of the application.

From the contents of the affidavit supporting the notice of motion, on the issue of delay to file the application for revision on time, the applicant avers that this was caused by delay to be supplied with copies of proceedings despite having requested for the same within time. Part II paragraph 2 of the affidavit supporting the notice of motion, the applicant avers there being illegality occasioned by the High Court judge on the face of the record. The counsel for applicant also submitting this is because the High Court Judge entertained extraneous matters which were not before her and gave an order of distribution of properties based on the law of marriage upon dissolution of subsisting marriage and sidelined the law governing inheritance. Thus contending that the application for revision is

intended to challenge the alleged errors and illegalities found on the face of the record of the High Court decision.

In response, the affidavit in reply by the respondent challenges the averments in the affidavit supporting the notice of motion on alleged reasons for delay to file the application and on the alleged illegality in the decision of the High Court. The respondent counsel during oral submissions before me, argued that the reasons for delay to file the application advanced by the applicant are not sufficient and cannot be taken to show good cause as required by the law. Arguing that the only reason provided by the applicant that she failed to get the High Court proceedings on time and that the supporting document referred to by the applicant that is; "*Annexure C*" is nothing but a letter to the Deputy Registrar, there being substantive to support the applicant's asserting on having pursued the matter further or conducted follow-up thereafter to get the relevant proceedings and orders. The counsel for the respondent cited the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015 (unreported), a decision of this Court by a single Justice when discussing the import of the case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian**

Association of Tanzania, Civil Application No. 2 of 2010, where reference was made to the guidelines set for a court to be guided by when considering an application for extension of time, and the counsel thus argued that this application does not fall within the ambit of the said guidelines since the applicant failed to account for all the said guidelines.

The respondent's counsel submitted further that even if the applicant's allegation of there being illegality in the decision of the High Court were true, there is no apparent illegality discerned from the records as expounded in the High Court in its deliberation cited the decision of **Mbogo vs. Shah (1968) EA** in its findings when considering the issue being challenged and therefore he argued, there was no illegality discerned from the records. Mr. Sanga also cited the case of the **Principal Secretary Ministry of National Services vs Devram Valambhia** [1991] TLR 387, where it was held that where illegality is alleged as a reason for extension of time, it can be considered where it is proved, while in the present case the allegations have not been proved he contended. The respondent counsel further submitted that, matters expected to be considered where there are assertions of illegality in proceedings and

decisions are such matters such as jurisdiction, and this must be on the face of it and one need not research to discern such illegality.

Submitting further that the order of the High Court Judge was for the applicant to be included in the inheritance and thus benefit from the properties of the deceased during the time she started living together with the deceased up to the time they departed. That the High Court judge considered the fact that there were properties the deceased acquired with his first wife, and if the said distinction would not have been made it is the children who will be prejudiced.

The counsel for the respondent also challenged the application itself, that is, the notice of motion, saying the way it is set, it does not comply with Rule 48(1) of the Rules but that the present application supporting affidavit contravenes what it is supposed to contain, having extraneous matters. He also challenged the notice of motion for failure to provide grounds for the prayers sought as expected. The counsel thus prayed that the application be dismissed with costs.

The applicant's rejoinder was brief, with regard to anomalies in the notice of motion and affidavit, she alleged that she being a layperson relied on the advice of her legal adviser not in Court but she was aware this

Court has all the powers to determine the matters and issues raised. She reiterated what is averred in the affidavit supporting the application on reason for delay to file the application and the prayers sought.

I now move to delve on the issues raised in the notice of motion, supporting affidavit, affidavit in reply and the oral submissions before me for consideration. I find it prudent to start by addressing some of the issues raised by the counsel for the respondent for the guidance of this Court so that they can be disposed of at this stage, such as the assertion that the notice of motion and the affidavit omit important matters and contain extraneous matters such as the notice of motion not revealing grounds for the application. It is clear that the Rules direct modalities for filing an application.

Rule 48(1) of the Rules prescribes the form of application to the Court as follows: *"Subject to the provisions of sub-rule (3) and to any other rule allowing informal application, every application to the Court shall be by notice of motion supported by affidavit, it shall cite the specific rule under which it is brought and state the ground for the relief sought"*.

I have had time to go through the notice of motion and the supporting affidavit. While it is obvious that the notice of motion does not

reveal the grounds in the normal manner or as guided, there is no doubt that the grounds are revealed in the affidavit especially Part II and III of the affidavit, mainly being illegality in the decision of the High Court and delay in filing the application was caused by reasons beyond the applicant's reach, that is, not being supplied with a copy of proceedings in time.

I find the respondent contention that the Notice of motion is not competent is not tenable. I find the errors pointed out are not fatal in the light of the fact that having regard to the fact that they are there in the affidavit supporting the application, one cannot say that the respondent was prejudiced. I find this situation falls within the purview of the import of what was determined by the Court in **The Principal Secretary, Ministry of Defence vs Valambhia** (supra), that:

"...notice of motion and the accompanying affidavit are in very nature of things complementary to each other, and it would be wrong and indeed unrealistic to look at them in isolation. The proper thing to do is to look at both of them and if on the basis of that it is clear what relief is being sought then the court should consider and determine the matter regard being had to the objection if any, raised by the opposite party".

I find the affidavit is couched in such a way that is not common but what it reveals is averments of what the deponent believes to be facts. When asked to respond on this issue, the applicant had nothing concrete to allude to except to state that she is a layperson and it was her legal adviser who prepared it on her behalf. The Court finds that the paragraphs which can be said to have conclusion, arguments and prayers are such as paragraph 3, Part II paragraph 2, which the Court proceeds to expunge from the records, and despite this, I find it does not adversely affect the standing of the affidavit supporting the application on important matters raised. Thus the remaining averments render the affidavit competent with only minor and curable defects.

Moving to the grounds of the application, the assertions by the applicant is that the delay was due to a good cause which they have submitted to and also that there are illegalities and incurable error in the judgment of the High Court warranting the need for granting of the prayers sought and enable a proper scrutiny of the perceived errors and alleged illegalities.

A careful consideration of the notice of motion, the supporting affidavit, the affidavit in reply and the competing oral submissions, bears

recounting that although the power of the Court to extend time under Rule 10 of the Rules is both extensive and discretionary, it can only be exercised if good cause is shown. Rule 10 of the Rules categorically states:

"The Court may, upon good cause shown, extend the time limited by these Rules or by any decision of the High Court or tribunal for the doing of any act authorized or required by these Rules, whether before or after the expiration of that time and whether before or after doing of the act, and any reference in these Rules, to any such time shall be construed as a reference to that time as so extend".

The case of **Lyamuya Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported), the Court reiterated factors for consideration in granting of extension of time that is; length of the delay, the reasons for the delay; the degree of prejudice the respondent stands to suffer if time is extended, whether the applicant was diligent, whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged and the overall importance of complying with prescribed timelines.

In the current application, the applicant avers in the affidavit supporting the notice of motion that the main cause of delay is failure by the 2nd appellate court to supply the proceedings on time despite having requested for them within a reasonable time. It is on record that the impugned Judgment was delivered on 17th November 2017. On the same day, that is, the 17th day of November 2017, the applicant's request for judgment, decree and proceedings was filed, records reveal there is no other communication from the applicant to the High Court's officials on this issue.

I am aware that there is letter dated 25th October 2018 to the Principal Judge (JK), but the contents relate to a complaint against the Primary Court Magistrate of Morogoro Urban and seeking the intervention of the JK by way of revision on matters related to the Probate cause and nothing related to failure to be supplied with proceedings. In the affidavit supporting the application, paragraph 4 of part III, the applicant avers that she has diligently payed visits and wrote letters to initiate revision proceedings, but not on follow-up of proceedings. One cannot say that the above averments show what transpired each day of delay as settled by various decisions of this Court.

Having considered all the submissions before me, I find that the applicant has failed to account for all the period of delay and also to show that the delay was not inordinate as expounded in the guidelines set in **Construction Company Ltd vs Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra).

This being the case, I move to consider the last guideline whether there is other sufficient reason of sufficient importance such as the illegality of the decision sought to be challenged. The applicant has raised the issue of illegality. We are aware of the holding in the **Principal Secretary Ministry of Defence and National Service vs Devram Valambhia** (supra) that:

"In our view, 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 the purpose, to ascertain the point and if the alleged illegality be established, to take appropriate measures to put the matter and the record straight".

When going through this finding it is important to understand as stated in **Ngao Godwin Losero vs Julius Mwarabu**, (supra) that:

"it is noteworthy that in Valambhia's case (supra), the illegality of the impugned decision was clearly visible on the face of the record".

This holding thus reminds courts when considering allegations of illegality of impugned decisions as a reason to find good cause in delay when seeking extension of time, to exercise caution and consider specific circumstances especially by taking time to consider whether the illegality is visible on the face of the record. The case of **Lyamuya Construction Company** (supra) had this to say on the issue:

"Since every party intending to appeal seeks to challenge the decision either on points of law or facts, it cannot in my view, be said that in Valambhia's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. The Court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process"

The respondent counsel challenged the assertion of illegality in the decision of the High Court finding that there is no apparent illegality on the face of record while the applicant stated otherwise, supporting his contention. When applying the above holding to the current application, I find nowhere on record that the High Court Judge "*gave an order of distribution of properties based on the Law of Marriage Act upon dissolution of subsisting marriage and sidelined the law governing inheritance*" as alleged by the applicant through averments in paragraph 1 and 3 of Part 11 of the affidavit supporting the application. Also the assertion in Paragraph 2 of Part II of the affidavit supporting the application seem to not capture the essence of the Judgment of the High Court.

In the premises I am not persuaded that the alleged illegalities and errors are apparent on the face of the impugned decision, as it is, it will require a long process to discern the said assertions. I am of the view that the applicant has failed to demonstrate good cause for the delay to warrant grant of extension of time as sought.

In the end, this application is hereby dismissed. Taking into consideration all the circumstances obtaining in this matter, each party to bear own costs. Order Accordingly.

DATED at **DAR ES SALAAM** this 26th day of August, 2019.

W. B. KOROSSO
JUSTICE OF APPEAL

The ruling delivered this 5th day September 2019 in the presence of Applicant in person and Mr. Melkior Sanga, Counsel for the Respondent is hereby certified as a true copy of the original.


E. Y. MKWIZU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL