

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

CIVIL APPLICATION NO. 419/8 OF 2022

SOLOLO JUMANNE YAMLINGA,

As Administrator of the Estate of the Late

Jumanne Yamlinga 1st APPLICANT

ALFRED JUMANNE YAMLINGA 2nd APPLICANT

BULUGU JUMANNE YAMLINGA 3rd APPLICANT

MARIA JUMANNE YAMLINGA 4th APPLICANT

PRISCA JUMANNE YAMLINGA 5th APPLICANT

VERSUS

MSAFIRI JUMANNE MASHAKA..... RESPONDENT

(Application from the Ruling of the High Court of Tanzania)

(Kahyoza, J.)

Dated the 18th day of March, 2022

in

Miscellaneous Civil Application No. 97 of 2021

RULING

01st & 8th, December, 2022.

RUMANYIKA, J.A.

Mainly predicated under rules 45A (1) (C) (2), (3) and 48 (1), (2) of the Tanzania Court of Appeal Rules, 2019, (the Rules), is a second bite application, after refusal by the High Court (Kahyoza, J.) on 18/03/2022. Sololo Jumanne Yamlinga and 4 Others, the applicants are seeking an extension of time within which to file an application for certification on point

of law to the Court in respect of the decision of the High Court (Tiganga, J.) dated 08/06/2021. The application is supported by a joint affidavit of the applicants. The respondent did not file affidavit in reply to contest the application.

All began at Ilemela Primary Court in Probate Cause No.20 of 2009. In that cause, the first applicant was appointed an administrator of the estate of the Late Jumanne Yamlinga, to lead the rest of the applicants, his co-heirs towards the division that estate which is house at Plot No. 162 Block U, situate at Mitimirefu area in the city of Mwanza (the House). In the course of distributing, it with the view to each one taking his share, it was auctioned and sold to the respondent as the highest bidder for TZS. 190,000,000/=. However, that sale was successfully challenged and nullified by the District Court, with the direction for a fresh auction to be carried out. Aggrieved by that decision, the respondent succeeded on appeal as the High Court blessed the said sale. The applicants are dissatisfied with that decision and wish to appeal against it. However, they are time barred, hence the second bite application.

The applicants have pegged the application on the following grounds: **one**, that, the auction and sale of the house was carried out without official valuation, **two**, that, the High Court improperly evaluated the evidence on

record, **three**, that, they were supplied with the copy of the impugned decision and proceedings belatedly and, **four**, that, a copy of the ruling availed to the applicants did not reflect true date of its delivery.

At the hearing of the application, Messrs. Felan Kweka and Steven Makwega learned counsel appeared for the applicants and the respondent respectively.

At the commencement, Mr. Makwega readily supported the application, that, the applicants' delay was justified as they had shown good cause therefor.

Rejoining, Mr. Kweka urged me to grant the application as presented for it was not contested.

Despite Mr. Makwega's concession to the application as above indicated, I invited both learned counsel to address me with respect to the limitation period, on the competence of the application. Mr. Makwega contended that the application was filed on 20/06/2022 which is about three months of the High Court's refusal order dated 18/03/2022, and this, he added, contravened rule 45A (1) (c) of the Rules which set forth fourteen days limitation. He urged me to dismiss the application for being time barred.

On his part, Mr. Kweka stressed for the Court's indulgence and discretion to grant the application, much as he agreed with Mr. Makwega that, indeed the application is time barred, save for the consequences which should be to strike it out instead of dismissing it, as the High Court Judge did.

Now that, as above clearly pointed out, the learned counsel agree that the application is time barred, the point is no longer whether the application is time barred but whether it should be dismissed or struck out. The period of limitation available for the institution of a second bite application for an order of extension of time under rule 45A (1) (c) of the Rules is fourteen days. It reads thus:

... Where an application for extension of time

to:-

(a) Lodge a notice of appeal;

(b) apply for leave to appeal; or

(c) apply for a certificate on a point of law,

is refused by the High Court, the applicant may

within fourteen days of such decision apply to

the Court for extension of time. (Emphasis added).

Following the said refusal by the High Court on 18/03/2022, and, applying the above stated legal principle to the present application and

the fact that it was filed on 20/06/2022 which was about three months later, on the seventy fifth day far beyond the 14 days required under the Rules, the application is therefore, time barred as conceded by Mr. Kweka.

As regards what should be the resultant order, it is equally noteworthy to state that, the issue of time bar is fundamental as it touches on the court's jurisdiction. See – our decision in **Said Mohamed Said v. Muhsin Amiri & Another**, Civil Appeal No. 110 of 2020 (unreported). It is trite law thus, that a time-bar renders the matter liable, not to be dismissed but to be struck out as was held by the Court in a number of cases including **Barclays Bank Ltd. v. Phylisiah Hussein Mcheni**, Civil Appeal No. 19 of 2016 (unreported). Like some other facts which were not disputed in this application, upon Mr. Makwega's readily conceding to the application, ordinarily, the application would have been granted as presented. However, it is equally imperative to stress that, time bar to any proceedings before a court of law is statutory. Just as there are courts of law and not courts of the parties. It follows therefore in passing that, the parties to the case do not make law nor can consent to suspend operation of the law. In this case, rule 45A (1) (C) of the Rules provides for the limitation period for filing of a second bite application for extension of time.

Faced with the similar situation in **Paulo Mbogo v. Republic**, Criminal Application No. 111/01 of 2018 (unreported), we held that:

"Where, like here an application for extension of time is not opposed the court is still under duty to see to it, and to satisfy itself, that the rules governing such an application have to be followed to the letter".

Now that the application is no doubt time-barred, the learned counsel's quest to have it heard on its merits cannot be blessed by the Court.

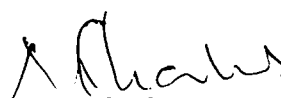
The up short of it all is that, the application is time barred and I hereby strike it out with costs to the respondent. Order accordingly.

DATED at **MWANZA** this 8th day of December, 2022.

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Ruling delivered on 8th day of December, 2022 in the presence of the applicant, the 2nd, 3rd, 4th, 5th applicants and the 1st respondent are absent, is hereby certified as a true copy of the original.




C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL