

**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**CIVIL APPLICATION NO. 508/01 OF 2020**

**WILBARD MATHEW SENGU (Administrator of  
the estate of the late Mathew Orestes Sengu) .....APPLICANT**

**VERSUS**

**MKWEKA GEORGE MATHEW SENGU.....1<sup>st</sup> RESPONDENT**

**LUSIA UPENDO MATHEW SENGU.....2<sup>nd</sup> RESPONDENT**

**(Application for extension of time to file an application for leave to appeal  
against the decision of the High Court of Tanzania at Dar es Salaam)**

**(Luvanda, J.)**

**dated the 11<sup>th</sup> day of October, 2018**

**in**

**Miscellaneous Probate Application No. 655 of 2016**

.....

**RULING**

8<sup>th</sup> Feb., & 10<sup>th</sup> May, 2023.

**SEHEL, J.A.:**

The applicant, Wilbard Mathew Sengu, through the legal services of Barnaba Luguwa, learned advocate from Luguwa & Co. Advocates, filed the present application seeking an extension of time within which to apply leave to appeal to the Court against the decision of the High Court of

Tanzania, Dar es Salaam District Registry at Dar es Salaam dated 11<sup>th</sup> day of October, 2018 in Miscellaneous Probate Application No. 655 of 2016. The application is made under Rules 10, 45 and 45A of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules) and supported by the affidavit deposed by the applicant, himself.

On the other hand, the respondents have filed a joint affidavit in reply to oppose the application. The applicant and the respondents have also filed their written submissions.

Briefly, the historical background is as follows: the applicant and the respondents are siblings of the late Mathew Orestes Senga who died on 27<sup>th</sup> October, 2004. However, they do not share the mother. The applicant's mother is Barbara Lilangara who, according to the applicant, solemnized her marriage with the late Senga on 1<sup>st</sup> February, 1950 at the Christian Roman Catholic Church, Kwirowa Parish, Mahenge diocese in Ulanga district at Morogoro region. The respondents' mother is Anna Noah Mbilu who, according to the respondents, had been living with the late Senga for 39 years at Kimara Matangini Ubungu in Dar es Salaam region. Upon the demise of their father, one Stephen Mathew Senga petitioned for letters of

administration through Probate and Administration Cause No. 6 of 2005. However, upon discovering of a Will that named the executor who happened to be the applicant herein, the Petition was withdrawn. The mother of the respondents and her son, one Bethold M. Senga successfully challenged the Will thus was nullified by the court. Thereafter, the applicant petitioned and on 9<sup>th</sup> February, 2010 was granted letters of administration through Probate and Administration Cause No. 51 of 2009. Aggrieved with the way the applicant was administering the estate of the late Senga, the respondents petitioned for revocation or annulment of a grant. They also wanted to be declared legal heirs of the estate of the late Senga. Having heard the application, on 11<sup>th</sup> October, 2018 the High Court (Luvanda, J) partly, ruled in favour of the respondents that they were legal heirs and thus entitled to inherit from the estate of their father, the late Senga but declined to revoke letters of administration.

Dissatisfied with the High Court decision, on 19<sup>th</sup> October, 2018 the applicant duly lodged a notice of appeal and applied for copies of ruling, decree and proceedings for purposes of preparing record of appeal. Since this decision of the High Court is appealable with leave and given that the

applicant was late in seeking leave, on 27<sup>th</sup> December, 2018 he lodged before the High Court an application for extension of time to apply leave to appeal but it was struck out for containing a defective affidavit. Therefore, on 2<sup>nd</sup> August, 2019, the applicant filed another application before the High Court which was dismissed for want of merit, hence, the instant application.

According to the notice of motion and the supporting affidavit, the application is premised on the following grounds, that:

*"a) The trial judge erred in law in not considering the fact that the respondents Mkwera Gorge Mathew Senga was 38 years old and Lusia Upendo Senga was 45 years old and born out of wedlock when they sought for the said right of inheriting from the estate of the late Mathew Orestes Senga under the Law of the Child.*

*b) The trial judge erred in law in interpreting section 3 read together with section 10 of the Law of the Child Act, 2009 rendered protection even to the adults.*

*c) The learned trial judge as well as Mlyambina, J. in his ruling dated 25<sup>th</sup> August, 2020 erred in law*

*when they made a stand legalizing producing children out of wedlock by a married person by giving the said issues status to the siblings born within the wedlock.*

*d) Mlyambina, J. erred in law in refusing to extend time so that the said illegality of allowing grownups be allowed to inherit as protection under the Law of the Child Act which seem to be against his conscience so that the same can be reconsidered and made straight by the Court.*

*e) The trial judge erred in law in not considering the fact that the applicant had filed another application which was struck out merely because of the form of the jurat which was a pity procedural irregularity which is currently not a fatal error."*

At the hearing of the application, Mr. Barnabas Luguwa, learned advocate appeared for the applicant whereas the 2<sup>nd</sup> respondent was present in person. She had no legal counsel to represent her. The 1<sup>st</sup> respondent was absent. According to the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent was sick.

Mr. Luguwa began his submission by fully adopting the contents of the notice of motion, affidavit in support of the application and written submissions. Expounding further as to why this Court should allow the application, he submitted that the applicant who resides in Mahenge, Morogoro was not present when the decision of the High Court was delivered on 11<sup>th</sup> October, 2018 because the same had been adjourned on several times such that the applicant lost track of the matter. He further submitted that on that date, it happened a close family relative of the applicant, one Steven Senga, was within the court precincts on another matter. He appeared and collected the ruling on 16<sup>th</sup> November, 2018. He argued that by the time Steven collected the ruling, the time to apply for leave had already expired. He added that the first application for extension of time was filed on 27<sup>th</sup> December, 2018 because the applicant could not travel in time to Dar es Salaam. He was required in Mahenge to attend a meeting convened by the Deputy Minister for Minerals to discuss compensation matters between Ipanko villagers and the investor in respect of acquisition of land including part of the estate of the late Senga. Mr. Luguwa pointed out that the applicant managed to travel and arrived in

Dar es Salaam on 18<sup>th</sup> December, 2018 and instructed him, the advocate to prepare and file an application for extension of time which was filed on 27<sup>th</sup> December, 2018. It was the submission of Mr. Luguwa that the delay in pursuing leave was beyond the applicant's power and that after the first application was struck out, he promptly and diligently filed another application. He thus urged me to grant the application. He supported his submission that the applicant was diligent and acted promptly by citing the case of **Mariam Idd (the administrator of the estate of the late Mbaraka Omary) v. Abduirazak Omary Laizer & Another**, Civil Application No. 29 of 2014 (unreported).

He further submitted that there were illegalities in the intended impugned decision of the High Court that it erroneously considered the respondents as children covered under sections 3 and 10 of the Law of the Child Act, Cap. R.E. 2022 (the Law of the Child) whereas the 1<sup>st</sup> respondent was 38 years old and the 2<sup>nd</sup> respondent was 45 years old at the time of petitioning thus not covered under the Law of the Child. He further submitted that since the respondents were born out of illegal affair, they cannot be lawful heirs of the late Senga.

In reply, the 2<sup>nd</sup> respondent also prayed to adopt affidavit in reply and written submissions which were filed to oppose the application for extension of time. She then argued that the applicant failed to account for each day of delay. She pointed out that the applicant retained an advocate in the High Court whom he filed a notice of appeal and wrote a letter requesting for copies of ruling, order and proceedings hence it is inconceivable of him not to be present in court during the delivery of the ruling and not to apply leave to appeal on time. She therefore prayed for the application to be dismissed with costs.

In rejoinder, Mr. Luguwa conceded that he was representing the applicant but reiterated his earlier submission that the date of delivering a ruling was being postponed on several occasions such that the applicant lost track of the matter.

In view of rival contentions of the parties, the only issue that stands for my determination is whether the applicant managed to exhibit good cause for the Court to grant the extension of time within which to apply leave to appeal. The power of the Court to extend time for doing any act is provided under Rule 10 of the Rules that reads as follows:



*"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 expiration of that time and whether before or after the doing of the act; any reference in these Rules to any such time shall be construed as a reference to that time so extended".*

[Emphasis added]

From the above Rule, the power of the Court to extend time is discretionary and can only be exercised where the applicant has shown good cause. This was clearly stated in the case of **Kalunga & Company Advocates Ltd v. National Bank of Commerce Ltd** [2006] TLR 235 where the Court was moved under Rule 8 (now Rule 10) of the Rules for extension of time. It said as follows:

*"The Court has discretion to extend time but such extension in the words of Rule 8 can only be done if **sufficient reason has been shown**".*

Thus, in application for extension of time, the applicant has to advance good cause for the Court to exercise its discretionary power.

However, the term "good cause" has not been defined under the Rules. The reason behind this is explained in the case of **Alliance Insurance Corporation v. Arusha Art Limited**, Civil Application No. 512/2 of 2016 (unreported) that:

*"... extension of time being a matter within the Court's discretion cannot be laid down by any hard and fast rules but will be determined by reference to all the circumstances of each particular case."*

Further in **Oswald Masatu Mwizarubi Vs Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010 (Unreported) it was stated that sufficient cause is relative and dependent upon the party seeking extension of time to provide relevant materials to move the Court to exercise its discretion. Although sufficient cause is relative but there are some guiding factors which the Court has to consider, depending on the circumstances of each particular case such as the applicant must account for all the period of delay; the delay must not be inordinate; the applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take and the existence of a point of law of sufficient importance such as illegality of the decision

sought to be challenged -see: **Lyamuya Construction Company Ltd v. Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No.2 of 2010 [2011] TZCA 4; [03 October, 2011, TANZLII], **Tanga Cement Company Limited v. Jumanne D. Masangwa & Another**, Civil Application No. 6 of 2001 [2004] TZCA 45; [08 April, 2004, TANZLII], **Regional Manager TANROADS, Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007 (unreported), and **Benedict Shayo v. Consolidated Holdings Corporation as Official Receivers of Tanzania Film Company Limited**, Civil Application No. 366/01/2017 [2018] TZCA 252; [11 September, 2018, TANZLII].

In the instant application, I will start to discuss ground (e) in the notice of motion, where the applicant claimed that he was still in the court corridors and that he belatedly became aware of the existence of the decision of the High Court and upon being aware took prompt action. According to the applicant's affidavit, the impugned decision was delivered on 11<sup>th</sup> October, 2018 in his absence. Nonetheless, one of the family members, Steven Senga was in court when the ruling was delivered. He

further deponed that the said Steven Senga was able to collect a copy of the ruling on 16<sup>th</sup> November, 2018 but at that time the period to apply for leave had lapsed. The applicant further deposed in paragraph 6 of his affidavit that soon after the ruling was delivered to Steven Sanga on 16<sup>th</sup> November, 2018, the said Sanga notified the applicant and the applicant instructed his advocate to lodge notice of appeal and to write letter seeking to be supplied with documents for appeal purposes. With due respect to that deposition, my close scrutiny of the copies of the notice of appeal and the letter requesting for copies of judgment, proceedings and order, annexed to the supporting affidavit, reveal that they were lodged much earlier than 16<sup>th</sup> November, 2019. Eight days later counted from the date of the ruling the notice of appeal was lodged as well as the letter requesting for copies of proceedings, ruling and order was written, that is, on 19<sup>th</sup> October, 2018. I have further noted that the copy of the order annexed to the supporting affidavit indicate the date when it was supplied. It was supplied on 16<sup>th</sup> November, 2018 but it does not state whether it was supplied to the said Steven Senga or not. Unfortunately, there is no

affidavit of Steven Senga to support the deposition of the applicant that the ruling was supplied to Steven Senga.

Nonetheless, there is now a plethora of authorities on the need of the applicant to take immediate action after becoming aware of the fact that he is out of time. For instance, in the case of **Royal Insurance Tanzania Limited v. Kiwengwa Strand Hotel Limited**, Civil Application No. 166 of 2008 (unreported) the Court stressed that:

*"It is trite law that an applicant before the Court must satisfy the Court that since becoming aware of the fact that he is out of time, act very expeditiously and that the application has been brought in good faith."*

From the facts deposed and according to the annexed copy of the ruling, the ruling was delivered on 11<sup>th</sup> October, 2018 in presence of Steven Sengas thus I considered that the applicant became aware of the existence of the ruling on 11<sup>th</sup> October, 2018. It is from that appearance of Steven Senga that enabled the applicant to lodge the notice of appeal and also write the letter requesting for the supply of the copies of proceedings,

ruling and order within time and on 16<sup>th</sup> November, 2018 he was supplied with the copy of the ruling and order. On 27<sup>th</sup> December, 2018 the applicant lodged his first application before the High Court but later on struck out. Immediately thereafter, the applicant filed another application before the High Court which was dismissed for want of merit on 20<sup>th</sup> October, 2020. Still aggrieved, the applicant lodged the present application on 27<sup>th</sup> November, 2020. Given the sequency of event, I find that the applicant has accounted for each day of delay as he diligently took all necessary actions in prosecution of his appeal. For that reason, I hold that the applicant accounted for each day of delay and was diligent in pursuing his rights of appeal.

Since, this ground alone suffices to grant the extension of time, I see no need of determining further grounds (a), (b), (c) and (d) in the notice of motion which I believe they touch the substantive matter worth for consideration by the Court.

In the end, since the applicant accounted for each day of delay, I find that the application has merit. Consequently, I grant the applicant the extension of time within which to file an application for leave to appeal to

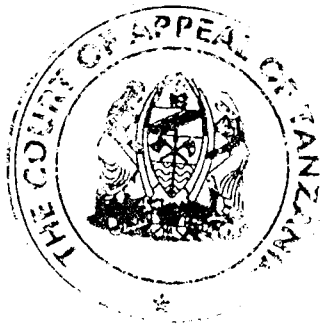
the Court from the decision of the High Court in Probate and Administration Cause No. 655 of 2016 dated 11<sup>th</sup> October, 2018. The applicant is granted fourteen (14) days counted from the date of delivery of this ruling within which to lodge the application for leave. Costs shall abide to the outcome of the application for leave.

It is so ordered.

**DATED at Dar es Salaam** this 5<sup>th</sup> day of May, 2023.

B. M. A. SEHEL  
**JUSTICE OF APPEAL**

The Ruling delivered this 10<sup>th</sup> day of May, 2023 in the presence of Mr. Richard Kimeru, Legal Officer for the applicant and the respondents appeared in person, is hereby certified as a true copy of the original.



  
F. A. MTARANIA  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**