

**IN THE HIGH COURT OF TANZANIA  
DAR ES SALAAM DISTRICT REGISTRY  
AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL APPLICATION NO. 251 OF 2015  
(From Kinondoni District Court Probate Appeal No.10/2013-Hon.Mtarania-R.M.)**

|                              |               |                   |
|------------------------------|---------------|-------------------|
| <b>SELEMANI ABDUL HANYA</b>  | .....         | <b>APPLICANT</b>  |
|                              | <b>VERSUS</b> |                   |
| <b>MUSTAPHA ISMAIL HANYA</b> | .....         | <b>RESPONDENT</b> |

Date of last Order: 17<sup>th</sup> June, 2015

Date of Ruling: 24<sup>th</sup> July, 2015

**RULING**

**Feleshi, J.:**

The above Applicant filed his Application in this Court for leave to appeal out of time following her failure to lodge his appeal within time. The Application was filed by way of Chamber Summons under Section 14(1) of the Law of Limitation Act, Cap.89 R.E.2002 and Section 25(1)(b) of the Magistrate Court Act, [Cap.11 R.E.2002] and is supported by his Affidavit.

When the Application was called on for hearing on 17<sup>th</sup> June, 2015 the Respondent who is a lay person and unrepresented, moved the Court to order the hearing to be conducted by way of written submission. Ms Esther Nyagimba, the learned Advocate who represented the Applicant concurred to the prayer and both parties were thus given a schedule within which to file their written submissions. Very unfortunately, the Respondent without any explanation or leave of this Court did not comply with.

Since the attendant consequences of failure to file written submissions are similar to those of failure to appear and prosecute or defend, as the case may be (see: **P3525 Lt Col Idahya Maganga Gregory V. The Judge Advocage General**, Court Martial Cr. Appeal No.4 of 2002, in the Court Martial Appeal Court,, **Ivan Mankobrad v Miroslav Katik and Annor**, HC.Civ Case No.321/1997 (Dar Registry),**Wananchi Marine Products (T) Limited v Owners of Motor Vehicles**, HC. Civ. Case 123/1996, **Maria Rugarabamu v NHC and Annor**, HC. Civil Appeal 32/1996, **Frederick A.M.Mutafurwa v CRDB 1996 Limited and Others**, HC. Land Case No.146/2004 and **Petro Andrea v Mwishehe Abdallah**, HC. Civil Application No 58 of 2008 (all unreported decisions from HC., Dar es Salaam Registry) I have determined this Application based on the filled Applicant's Affidavit, Respondent's Counter Affidavit and the Applicant's submission.

In his Affidavit, the Applicant deposed at Paragraphs 2 and 4 that he failed to file the appeal on time due to the fact that he was waiting for copies of judgment and that their intended appeal have reasonable issues of law as they consider that the trial court erred in law to allow children born out of wedlock to inherit from the deceased's estate contrary to the Islamic laws. In his submission through the service of M/S Sama Attorneys the Applicant submitted that his delay to file his appeal out of time is therefore justified and the points aforesaid constitutes sufficient cause. To support his position he referred this Court to the decision of the Court of Appeal in the case of **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited**, Civil Application No. 96 of 2007

(unreported) where his Lordship Nsekela, J.A. (as he then was) held at page 5:

“What constitutes “sufficient reason” cannot be laid down by hard and fast rules. This must be determined by reference to all circumstances of each particular case. This means that the applicant must place before the Court material which will move the Court to exercise its judicial discretion in order to extend time limited by the rules. In the case of **Ratma v. Cumarasamy and Another** (1964) 3 All ER 933, Lord Guest had this to say at page 935A-

“The rules of courts must, prima facie be obeyed, and, in order to justify a court extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. if the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time-table for the conduct of litigation.”

In the light of the above position the issue before me therefore is whether there is sufficient reason for this Court to exercise its discretion and extend time to the Applicant to file his Appeal out of time.

In determining this issue, I have also to point out here that the Application before me originates from the Primary Court and thus governed by the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules, G.N.312 of 1964. In the case of **Gregory Raphael v. Pastory Rwehabura** [2005] TLR 99 it was held that:

“Attachment of copies of decrees and judgments is a condition precedent in instituting appeals originating from District Courts and courts of resident magistrates, but for appeals in matters originating from Primary Courts there is no such requirement and the filing process is complete when the petition of appeal is filed upon payment of the requisite court fees; accordingly, the appeal in this case is time barred as time started to run after the date of delivery of the decision of the District Court.”

The procedure applicable for lodging applications for leave to appeal out of time is prescribed by Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules (supra) which provides:

"An application for leave to appeal out of time to a district court from a decision or order of a primary court or to the High Court from a decision or order of a district court in the exercise of its appellate or revisional jurisdiction shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision or order against which it is desired to appeal, and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order:

Provided that where the application is to a district court, the court may permit the applicant to state his reasons orally and shall record the same."  
[Emphasis supplied]

From the foregoing position, I can hold rightly here that a mere fact that the Applicant failed to file the appeal on time due to the fact that he was waiting for copies of judgment as alleged in Paragraph 2 of the Applicant's Affidavit cannot on itself constitute sufficient cause to justify his delay. That must, if need be, be considered together with other causes (if any) advanced by the Applicant.

In Paragraph 3 of his Affidavit the Applicant also is on record to have averred "**That I honestly believed that without the document that is certified copy of judgment, I could not successful file my appeal until recently.**"

In the case of **Freedom Isaack v. Yusufu Abdallah**, HC. Miscellaneous Civil Application No. 63 of 2012, Dar es Salaam Registry, (Unreported) this Court attended a relatively similar situation and held:

"Whereas I do not have any problem whatsoever with the position amplified by this Court in the case of **Gregory Raphael** (supra) and Rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules (supra) that the applicant is not obliged to attach copies of judgment and decree to his appeal, I find myself persuaded by his forceful argument that his petition of appeal in his case was dependent on the copies of judgment and decree...In my unfeigned opinion, if a party who is aggrieved by the decision of the Primary Court finds himself not in a position to draw up his petition of appeal or make an oral statement as per rule 3 above because he feels it is important to first acquaint himself with the contents of the judgment and the extracted decree, for interest of justice, the courts of law should be obliged to pay attention to that requirement which I find has justification. In doing so, they may likely find out that in some cases delay to supply requested copies of judgment and decree do inevitably constitute good and sufficient cause. Because, a smart applicant will be cautious and wish to draw his petition of appeal whose grounds of appeal are based on the contents of the decision."

The Court continued and observed that:

One thing I have discerned from G.N.312/1964 above is its vivid object to do away with the condition to attach copies of judgments and decree with a view to simplifying the appellate process. This to me sounds well with laymen appellants and those who do not need to satisfy themselves with the contents of the judgments and decree before drawing up their petitions of appeal. Perhaps it is also meant to expedite the appeal processes. However, with the good spirit obtaining in rules 3, 4 and 5 of that G.N 312/1964 it should not be overlooked that some cases are tricky and complex and one may need to first appreciate the contents of judgment, proceedings and decree in order to prepare a sound and legally deserving petition of appeal. It may also happen for situations where a judgment was not read in full to parties."

Since it has been indicated above that the Applicant at Paragraph 3 of his Affidavit deposed that he honestly believed that without the certified copy of judgment could not successful file his Appeal that reason when considered together with the legal issue reflected at Paragraph 4 of which

the appellate court will be invited to determine are, in my unfeigned opinion, good and sufficient causes to warrant enlargement of time within which the Applicant should lodge his appeal. This position therefore do not depart from that laid in **Regional Manager, TANROADS Kagera** (supra) that requires courts to exercise its discretion by considering all circumstances of each particular case.

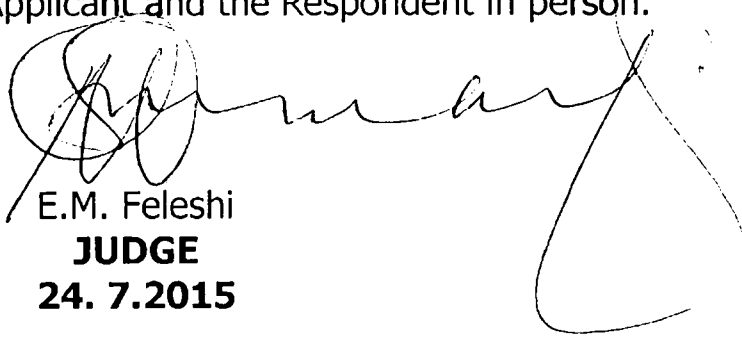
In view of the foregoing, I grant the Application and give the Applicant fourteen (14) within which to file his Appeal pursuant to the procedure prescribed by the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules above. I issue no order as to costs. I rule accordingly.

DATED at Dar es Salaam this 24<sup>th</sup> July, 2015



  
E.M. Feleshi  
**JUDGE**

Ruling delivered on this 24<sup>th</sup> July, 2015 in the presence of Ms Esther Nyagimba, Advocate for the Applicant and the Respondent in person.

  
E.M. Feleshi  
**JUDGE**  
**24. 7.2015**