

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISCELLANEOUS CIVIL APPEAL NO. 31 OF 2017

(Originating from Matrimonial Cause No. 09 of 2014 in the Resident Magistrate

Court of Arusha at Arusha)

GRACE ALENDWA.....APPLICANT

VERSUS

1. WILLIAM OTIAYOI MOLLEL  
2. GIBSON BATHORLMEO MOLLEL } ..... RESPONDENT  
(As administrators of estate of the late  
Bartho Lookaki)

**RULING**

MWENEMPAZI, J.

The applicant herein has filed a Chamber Application under section 14(1) of the Law of Limitation Act, Cap. 89 R.E.2002 seeking an extension of time to appeal to the High Court against the decision of the Resident Magistrate Court of

Arusha in Matrimonial Cause No. 09 of 2014 which was made on the 16<sup>th</sup> day of April, 2016.

In that case, the petitioner, Bartho Lookaki (now deceased) filed a petition for divorce against the applicant, petitioning for the court's order that their marriage is broken irreparably and that the respondent be ordered to give vacant possession of the house of the Petitioner's father, costs of the petition and other reliefs at the discretion of the court. The Petition was heard inter-parties and both sides testified their case to its closure. It was unfortunate, however, that the petitioner died on the 14<sup>th</sup> April, 2016 before a judgement was delivered. The same was delivered on the 19<sup>th</sup> day of April, 2016. The court decided that:

- The marriage is irreparably broken down beyond repair
- The divorce paper should be issued
- The respondent is ordered to vacate from the house she lived in.
- Each party to bear its own costs.
- The respondent be given 20% of the mud house and house for rent owned by them and 80% placed to applicant.

The respondent, was aggrieved to the decision and orders of the court. But she never filed an appeal within the prescribed time (forty-five days) according to Section 80(2) of the Law of Marriage Act, Cap. 29 R. E 2002.

The applicant has stated the reason for delay in paragraphs 4 and 6 of an affidavit. In the said paragraphs she states that she was waiting for relatives of the petitioner to process administration of estate of the late Bartho Lookaki so that she may have the right person who will stand in the position of the deceased petitioner. The respondents in this application were granted letters of administration of estates of the late Bartholomeo Lookaki in Mirathi NO. 116 OF 2016 in the Arusha Urban Primary Court. Unfortunately, the process was done secretly. The applicant came to know, of late, that the respondents have been appointed as administrators of the estate of the late Bartho Lookaki. She is now asking for the court order to extend time to appeal to the High Court against the decision of the Resident Magistrate Court of Arusha in Matrimonial Cause No. 09 of 2014.

This matter was ordered to be disposed of by way of written submission. The applicant was represented by Ismail Ayo, learned counsel, the 1<sup>st</sup> Respondent was represented by S.J. Lawena, Advocate and the 2<sup>nd</sup> Respondent was not represented. All parties faithfully complied to the order of the court by filing their written submission timely.

The applicant in her written submission, asserts that she has sufficient grounds which made her to delay filing an appeal within the time as required by law. She submits that the judgement was delivered on 19<sup>th</sup> day of April, 2016; six days after the petitioner had passed away. She felt aggrieved by the decision and orders of the court right immediately she was aware of the decision. Due to the death of the petitioner before the deliverance of judgement it was not possible for the Applicant to file an appeal because there was nobody to sue. In the opinion of the applicant one cannot frame and file Memorandum of Appeal in absence of the respondent. The process to appeal commenced after the applicant had collected a judgement and letters of administration of the estates of the late Bartholomeo Lookaki. The applicant has cited also the provisions of article 13(6) of the Constitution of the United Republic of Tanzania of 1977 that the court should rely on them in exercising its discretion to either grant or deny this application. However, she feels and believes that it is necessary, that she be given a chance to be heard.

The first respondent, however, objects to the application by the applicant. In his view, this application is the manifestation of the second thought by the applicant. As she never filed any notice to show an intention to appeal. The 1<sup>st</sup> Respondent however, has the opinion that this application is misconceived. His argument stands in two limbs. One, that the suit against the petitioner abated with

the death of the petitioner. It is unreasonable for the appellant to challenge the decision of the trial court as the main issue here is whether after the death of Bartho Lookaki who was the petitioner and now would have been the respondent, the claim against him still survives. Can the applicant pray that the divorce granted to her be revoked? The answer is negative; after the death of the petitioner the suit abated. In the second limb, the first respondent submits that it is plain and certain that, a party seeking the court to exercise its discretion to grant the application for extension of time in which to do a certain thing, he/she is duty bound to show good cause for having failed to do that same thing which ought to have been done within the prescribed time by law. That there must be sufficient reasons to move this honourable court to use its discretionary powers to extend time as prayed. In order to expound further his point, the 1<sup>st</sup> Respondent refers this court to the case of **Republic versus Yona Kaponda & 9 Others** [1985] T.L.R. 84 to explain what is meant by words 'sufficient reason'. The court in that case held that " 'sufficient reason' here does not refer only, and is not confined, to the delay. Rather, it is 'sufficient reason' for extending time, and for this I have to take into account also the decision intended to be appealed against, the surrounding circumstances, and the weight and implication of the issue or issues involved."

In the first respondent's view the applicant has failed to account for the delay to file her appeal and that if she is granted the extension of time as prayed she has nothing to claim from the respondent.

The second respondent, in response to the written submission by the applicant, supports the application and the arguments advanced by the applicant. In his view, the applicant has shown sufficient reasons for her delay in filing an appeal. He urges this court to consider also other factors apart for the reasons for delay which has been advanced by the applicant in order to advance the cause of justice. He however did not mention the said other factors for this court to focus on them.

The applicant in her rejoinder insists that despite knowing her right to an appeal she could not file an appeal in the subordinate court because the petitioner in trial court had already died before the deliverance of judgement. She had no other alternative than appealing against the decision against the administrator of estate as the respondent; she insists that she intends to challenge the order for division of matrimonial properties.

I have had time to go through the record of the court as well as the submissions by the parties in respect of this application. I am satisfied that the issue is whether the applicant had a sufficient reason which entitles her to move the

court for enlargement of time for her to file an appeal. There is no dispute that the petitioner in the trial court died untimely before he could know the decision of the court on the complaint he had filed. No doubt the appellant believes that her right has been infringed by the decision of the court and so she would like to contest the same by way of an appeal. She felt unable because the petitioner, expected respondent is dead. She therefore, thought it right for her to wait for the legal representative of the late Bartholomeo Lookaki to be appointed. I see it necessary now to find out as to whether she was right to wait for the appointment of the legal representative of the estate of the late Bartholomeo Lookaki. It was decided (as an *obiter dictum*) in the case of Said Kibwa and General Tyre E. A. Ltd vs. Rose Jumbe [1993] T.L.R. 175(C.A) that: -

*“the general rule is that all rights of action and all demands existing in favour of or against a person at the time of his death survive to or against his representatives, except those rights which are tied up with the individuality of the deceased which are caught up in the maxim **actio personalis moritur cum persona**, i.e., a personal right of action dies with the person.”*

In this case, the issue of divorce cannot be appealed against as the same died instantly with the demise of the petitioner. However, the distribution of assets survives to or against the legal representative of the deceased. Therefore, in this

respect, the applicant can appeal if she feels aggrieved. This is also her stand in the rejoinder to the first respondent's written submission.

The respondent in the petition of divorce or applicant in this application, has her right protected in law. An appeal in the petition of divorce lies as of right from the decision of the court by virtue of provisions of section 80(1) of the Law of Marriage Act, Cap. 29 R.E.2002. It was decided in the case of **Mohan Dairy v. Ratilal Bhurabhai**[1966]1E.A.571 that *an appeal as of right can be brought nominally against the deceased defendant notwithstanding the absence of the deceased's personal representatives on the record.*

The case cited above was an appeal from the decision of the resident magistrate, Nairobi, dismissing an application by the appellant (the original plaintiff) for an order that the suit, which had abated as a result of the death of the original defendant, should be revived and that the personal representative of the deceased defendant should be made a party. After the appeal had been filed, an order was made for the personal representative of the deceased defendant to be made a party to the appeal, and counsel has appeared on his behalf. Two preliminary objections were made at the hearing, the first, that the appeal is out of time, and the second that the appeal is incompetent, being in form brought against a dead man. The Court decided *that it is difficult to see how the appellant can exercise his right of appeal otherwise than by bringing the proceedings nominally*



*against the deceased defendant. It would be wrong to shut out a party from his undoubted right of appeal by reason of a defect in point of form which the appellant was powerless to remedy and in the circumstances so the second objection failed. (emphasis mine).*

It was therefore wrong for the applicant in this case to wait for the appointment of legal representative for her to file an appeal. In my view, she ought to have filed an appeal and later on apply for a legal representative to be made a party to the proceedings subject to limitation of time under the Law of Limitation Act, Cap. 89 R.E.2002 Item 16 of Part III of the Schedule to the Act.

The necessary part of this ruling is thus whether the applicant has made her case clear to warrant this court to exercise its discretion to enlarge time for her to appeal against the decision of the trial court. In my perusal of the court record it is clear that the applicant was not represented. She is however, being represented by an advocate in this application. She is a person who wanted to pursue her rights but she lacked the right knowledge of the way to do it or was wrongly guided. She feels her right has been denied by the decision of the trial court. She would like to be given a chance to state her case in the appellate court. Under the circumstances of this case, it would be improper to deny her that chance. Therefore, this court is compelled to decide in her favour. Time to file an appeal is enlarged and the

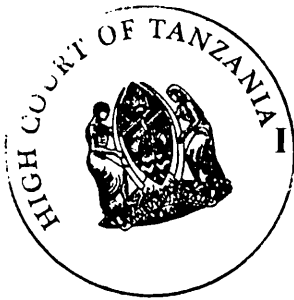
applicant is ordered to file an appeal within 14 days from the date of this ruling. No order is made as to cost.

It is ordered accordingly.

**SGD: T. M. MWENEMPAZI**

**JUDGE**

**5<sup>th</sup> September, 2018**



**I hereby certify this to be a true copy of the original**

A handwritten signature in black ink, consisting of stylized initials and a surname.

**S.M. KULITA**

**DEPUTY REGISTRAR**

**14/9/2018**