IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 70 OF 2019

(C/F Probate and Administration Appeal No. 12 of 2017 Babati District Court, Original Probate and Administration cause No 1 of 2009 Babati Primary Court)

ELIMINATA MASINDA
NICODEMUS CRECENT MASINDA .....**APPLICANTS**

VERSUS

MASWET MASINDA
JOSEPHAT MASINDA .....**RESPONDENTS**

RULING OF THE COURT

Last date, 4/05/2020 & 16/06/2020

GWAE, J

The applicants herein above through their advocate Mr. Bharat B. Chadha, filed this application under rule 3 of the Civil Procedure in proceedings Originating from Primary Courts Rules G.N No. 312 of 1964 praying for extension of time to file appeal against the judgment and decree of the District Court of Babati in Probate and Administration Appeal No. 12 of 2007.

This application is accompanied by the affidavit of the Applicants' counsel Mr. Bharat B. Chadha. The respondents' counsel Mr. Bungaya

Matle B. Panga filed a counter affidavit opposing the application. The parties' advocates whose affidavits were filed in support and opposition are the ones who also represented them before the court.

Before hearing of the application the court entertained the parties to address it, firstly, on the competence of the application brought by the applicants as to its propriety following the order of "striking out" by Hon. Mzuna J, in Pc. Civil Appeal No. 11 of 2018 and finally argue on the main application. The parties then agreed to dispose the matter by way of written submission

It is the submission of the applicants that their application is competent as their appeal was struck out and not dismissed and for that reason, they are entitled to re-file their application. In support of this the applicants' counsel cited a number of undecided cases from the Court of Appeal of Tanzania which have tried to differentiate between an order for "struck out" and "dismissal" in the sense that where an appeal or an application is abortive or incompetent before the court the remedy is to struck out rather than to have it dismissed for the latter phrase implies that a competent appeal or application has been disposed of.

On the main application the counsel submitted that, the reason for the delay was the sincere belief that the applicants appeal was salvaged by the non-working day's exclusion rule that when it is found that the period of limitation prescribed expired on a day when the court is closed, then the suit, appeal or application as the case may be, may be instituted, preferred or made on the day that the court re-opens. The learned counsel further submitted that there are apparent illegalities in the impugned decision which

can be reflected through the petition of appeal in grounds number 1, 12, 5, and 8. The counsel concluded his submission by making a remark on the respondent's counter affidavit in which the counsel contends that it is incompetent for lack of proper verification as it reads " *are time to the best of my knowledge"* instead of " *are true to the best of my knowledge"* and further para 4 of the counter affidavit is to be expunged for being wrongly verified as it shows that the deponent sourced this information from the court record or from the respondents which is not based on the deponent's knowledge.

The respondent on the other hand submitted the following on the competence of the application, that the application is not competent before this court for the reason that it was heard on merit and struck out for being instituted after a period of limitation (30 days). The counsel of the respondent went on submitting that although the word used in disposing the said appeal was "struck out" instead of "dismissal" he maintain that the holding by Mzuna J reading in line with the decision of Mkuye, J.A **in Yahya Khamis versus Hamida Haji Idd and 2 others,** Civil Appeal 225 of 2018 at Bukoba (Unreported) and section 3 of the Law of Limitation Act Cap 89 the word "struck out" in Mzuna J, decision meant dismissal of the appellants' appeal. The counsel further stated that he is mindful of the last two sentences used by the court in the case of NGONI MATENGO words which were approved by Mkuye J.A in the case of YAHYA HAMIS when trying to distinguish the word "striking out" and "dismissing" an appeal. The court said;

> ".....it is the substance of the matter that must be looked at, rather than the words used....."

It is from the above cited authorities the counsel maintains that the application is incompetent before this court.

Coming to the merit of the application, the counsel submitted that the applicants have not advanced sufficient reasons for the delay and for them to invoke section 19 (6) of Cap 89 R.E 2019 was improper and that the counsel ought to have made reference to Cap 11 R.E and or The Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules G.N no.312 of 1964. The counsel went further to say that the delay to file their appeal was out of ignorance of law and that the position of law is very clear that extension of time is not automatic and cannot be assumed by the parties. To batter this argument the counsel cited the case of **Augustino Elias Mdach and 2 others** v **Ramadhani Omari Ngaleba**, Civil Appeal No. 270 of 2017 (unreported CAT). The counsel was also of the view that had the applicants' counsel acted diligently he wouldn't have wasted time prosecuting PC. Civil Appeal No. 11 of 2018.

On the issue of illegalities the learned counsel was of the view that for illegality to constitute a good reason it must be visible on the face of record. Thus it was expected for the applicants to have sufficiently demonstrated the alleged illegalities in their affidavit and annex the copies of the decision to be challenged so that the purported illegalities could easily be seen instead of making mere statements.

As regard to the remarks made by the applicants' counsel on the verification clause, the counsel stated that it was nothing but mere

typographical error and he then invited the court to do away with technicalities as it was only a key board mistake and no injustice has been occasioned to the applicant due to the error. The applicants filed a rejoinder which basically reiterates what was stated in their submission.

In brief, that is what transpired in the submissions of the parties, I have carefully considered them extensively. As already pointed out earlier that parties were to address this court on the competence of the application I shall also determine the same first before going to the merit of the application.

From the records it appears that in PC. Civil Appeal No. 11 of 2018 the court raised five basic issues and one of them being whether the court had jurisdiction to deal with the matter? Is the appeal time barred? Parties presented their submissions on the issue and the court was of the view that the applicants had filed the appeal outside the 30 days' time set under the law and that it was not automatic for them to file this appeal outside the prescribed time. The applicants ought to have applied before the court for extension of time stating the reasons for the delay instead of addressing reasons for delay in the submissions. It is from the above reasoning that the court struck out the appeal for being time barred.

The question that follows is that, can the applicants lodge another appeal after the first appeal been struck out for being time barred? In answering this question I shall first consider the laws applicable with regard to the appeals originating from the Primary Courts. I agree with Mr. Panga that the relevant laws in this matter are the Civil Procedure (Appeals

in Proceedings Originating in Primary Courts) Rules G.N No. 312 of 1964 and The Magistrates' Courts Act Cap 11 R.E 2002. Both rule 3 of the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) Rules G.N No: 312 of 1964 and section 25 (1) (b) of the Magistrates' Courts Act Cap 11 give directives as to what should be done when a party is out of the prescribed time in filling an appeal. The next question would be what are the consequences of an appeal which has been filed out of time? Mr. Panga in his submission invoked section 3 of the Law of Limitation Act Cap 89, Revised Edition, 2002 when he was trying to substantiate the contention that, the word "struck out" applied by Hon. **Mzuna, J** in his lordship decision meant dismissal of the applicants' appeal. The section is hereunder reproduced;

> 3. Dismissal of proceedings instituted after period of limitation
> (1) Subject to the provisions of this Act, every proceeding described column of the Schedule to this Act and which is instituted after the period of limitation prescribed therefore opposite thereto in the second column, shall be dismissed whether or not limitation has been set up as a defence.

From the above wording of the law I am in agreement with the counsel for the respondents on the consequences of section 3 (1) of the Law of Limitation Act (supra) where an appeal or application is filed out of time is "dismissal" of that appeal or application nor does it of the word used in the order except the substance of the matter as was judicially demonstrated in **Ngoni Matengo Cooperative marketing Union Ltd v. Ali Mohamed Osman** [1959] EA 577 where it was held;

".But it is the substance of the matter that must be looked at rather than the words used".

Had the Law of Limitation (supra) been applicable in the Appeal before Hon. Mzuna, it follow that the substance matter would have been considered rather the words used in the order however in our instant case, the law applicable is not the Law of Limitation (supra) but it is the Magistrates' Courts (Limitation of Proceedings under Customary Law) Rules, GN. No. 311 of 1964, for sake of easy of reference, Rule 5 of the GN is reproduced herein under

"Where any proceeding is brought for the enforcement of a claim under customary for which no period of limitation is prescribed by this rule the court may reject the claim if it is of the opinion that there has been unwarrantable delay in bringing the proceeding and that the just determination of the claim may have been prejudiced by that delay".

According to the rule cited above, the applicants have a remedy of filing this application since their appeal was rightly struck out or it could have been rejected as the case in the Court of Appeal of Tanzania where an appeal or application is filed out of time, a proper order to make is "striking out' such appeal or application as the matter at hand is originating from primary court, thus the Law of Limitation Act (supra) is not applicable. This position of the law was equally stressed by the Court of Appeal in the case of **Herzon M. Nyachiya v. Tanzania Union of Industrial and**

Commercial Workers and another, Civil Appeal, No. 79 of 2001 (unreported), cited by the respondents' counsel where it was held;

> "We are impressed by Mr. Magesa observation that, it has been a practice of courts to strike such proceedings. But, we due respect with the learned counsel, we think he had in mind this court. If that is what he had in mind, then he was right. This is so because the law of Limitation Act does not apply in respect of proceedings instituted in this court as provided for under section 43 (b) of the said Act.

According to the GN. 311 OF 1964, the applicants still have remedy of filing this application and if granted to re-institute their appeal if they prefer however an exclusion of computation of weekend days under section 60 (1) of the Interpretation of Laws, Cap 1 R.E, 2002 asserted by the applicants' advocate would only be useful during submission before Hon. Mzuna, J on whether the applicants' appeal was time barred as of now my hands are tied up.

As to the merit or otherwise of the applicants' application, delay of one day is said to be due to a sincere belief on the part of the applicants' advocate. According to Mr. Chadha, the delay was legally salvaged by weekend days (non-working days). The delay of one day is seriously contended by the respondents' counsel to be an ignorance of the law which is, according to him, legally not excusable. According to factual delay of one day and the fact that the delay had fallen on non-working day since 20th January 2018 and 21st January 2018 which were vividly Saturday and

Sunday respectively, I think the applicants' advocate was neither negligent nor did he lack due diligence more so his belief is considerably taken into account as a human being error. In **Zuberi Mussa v. Shinyanga Town Council**, Civil Application No. 3 of 2007 (unreported-CAT)

> "Advocates are human beings and they are bound to make mistakes sometimes in the course of their duties whether such mistakes amount to lack of diligence is a question of fact to be decided against the background and circumstances of each case if for instance the advocate is grossly negligent and makes the same mistakes several times, that is lack of negligence. But if he makes a minor lapse or oversight only once and makes a different on next time that would not, in my view, amount to lack of diligence"

Now coming to the issue as 'whether the applicants have accounted for the delay from the date of this court order striking the applicants' appeal dated 12th July 2019 till on 19th July 2019 when this application was duly filed. It is apparent from the affirmed affidavit of the applicants' counsel that there is nowhere delay of seven days is accounted for except mere statement that the applicants did not waste time to file the present application (See paragraph 7 of their joint affidavit) while the respondents' counsel seriously argued that, the applicants have failed to account for delay from the date the applicants' appeal was struck out to the time this application was filed. I am alive of the established principle that, in applications for extension of time, applicants are required to account for each and every day of delay. I would subscribe my finding in the case of **Sebastian Ndaula v. Grace Rwamafa,** Civil Application No. 4 of 2014,

(unreported) Court of Appeal (**Juma, JA** now **CJ**) had these to say at page 8 of the ruling;

> "The position of this court has consistently been to the effect that in an application for extension of time, the applicant has to count for every day of the delay; see **Bariki Israel vs. Republic**, Criminal Application No. 4 of 2011 (unreported). The need to count each of the days of delay becomes even more important where matters subject of appeal like the present one is, was decided eight years ago..."

See also a decision of Court of Appeal with the same jurisprudence in **Lyamuya Construction Company LTD v. Board of registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

However in our present application, the applicants through their advocate's affidavit have absolutely failed to account for delay of seven days leave alone failure to account of each day of delay except mere assertion on the part of the applicants that the applicants acted promptly This is fatal as the same cannot be said to be a prompt action on the part of the applicants' advocate nor can it be said that there was due diligence on their part. It is nothing but a gross negligence which does not constitute sufficient cause as was correctly stated in **Yusuph Same and Another v. Khadija Yusuph,** Civil Appeal No.1 of 2002 (un-reported) approved **in Kamobona Charles as Administrator of the estate of the late Charles Pangani v. Elizabert Charles,** Civil Application No. 529/17of

2019 (Unreported-CAT) and **Bank of Baroda Ltd Mr. Charles Rwechungura, Receiver-Manager v. Pulses and Agro Commodities (T) Ltd Civil** , Application No. 128 of /2/2018 (unreported CAT)

Next question to be asked is whether 7 days delay amounts to prompt and diligent action or in ordinate delay, in the case of **Joseph Paul Kyauka Njau and another v. Emmanuel Kyauka Njau and another,** Civil Application No. 143/5/ of 2018 (unreported CAT at Arusha) where delay was of 13 days, the Court of Appeal held that the 13 days delay was found to be in ordinate however in the case of **Samwel Mussa Ng'omango v. AIC (T) Ufundi, (Mugasha, JA),** Civil Application No.26 of 2015 had these to say;

> "In my firm considered view, the applicant has acted promptly and diligently having filed the present application in less than 20 days since when he obtained the certificate."

In our case, the delay as earlier explained is of 7 days, looking at the nature of the matter that is probate and administration and the days of delay though not accounted for, I am inclined to refuse this application

Another ground for extension relied by the applicants is illegalities in the decision of the District Court of Babati at Babati vide Probate and Administration Appeal No. 12 of 2017 and in the Primary Court decision. Looking at the decisions and applicants' affidavit as well as their written submission, I have ascertained the illegalities or errors in the said decisions and observed none nor were the alleged illegalities established by the applicants or found to be apparent or to be of sufficient importance, (See

Principal Secretary Ministry of Defence and **National Service v. Devram Valambhia** [1992] TLR 185).

That told, this application is granted and no order as to costs is made the applicants are given **fourteen (14)** days within which to file his intended appeal

It is so ordered.

M.R.GWAE
JUDGE
16/06/2020