

**IN THE HIGH COURT OF TANZANIA**

**(DAR ES SALAAM REGISTRY)**

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 187 OF 2020**

(Arising from decision of Kinondoni District Court in Misc. Application No. 154 of 2019, Original Probate No. 149 of 2017, Hon. H.A. Kikoga, RM, Originating from Kawe Primary Court – Probate No. 149 of 2017)

**SYDNEY MWALUKASA ..... APPLICANT**

**VERSUS**

**FREDRICK AGGREY MWALUKASA** as a Legal Personal Representative of the late **BETHALINA AGREY MWALUKASA ..... RESPONDENT**

**RULING**

29<sup>th</sup> Sept & 16<sup>th</sup> Oct, 2020.

**E. E. KAKOLAKI J**

This is an application for extension of time within which to lodge an appeal out of time, against the decision of the District Court of Kinondoni of 28<sup>th</sup> day of February, 2020 before Hon. H. A. Kikoga, Resident Magistrate. The application is brought under Rule 3 of the Civil Procedure (Appeals in Proceedings originating in Primary Courts) Rules GN. 312 of 1964, Section 25(1) of the Magistrates Courts Act [Cap. 11 R.E 2019], Section 93 and 95 of the Civil Procedure Code, [Cap. 33 R.E 2019] and Section 14(1) of the

Law of Limitation Act, [Cap. 89 R.E 2019] supported by affidavit of the applicant **Sydney Mwalukasa**. On the other side the application is strongly resisted by the respondent who filed his counter affidavit challenging its merits.

Briefly, before the Primary Court of Kawe in Probate Cause No. 149 of 2018, the respondent was appointed the administrator of the estate of the late Bethalina Agrey Mwalukasa who died intestate on the 21/8/2014 at her home Kawe within Kinondoni District, Dar es salaam Region, and left behind among other estate three houses situated at Kawe. The petition for letters of administration was filed in court on the 21/08/2017, citation orders made and effected on 25/08/2017 and the matter scheduled for hearing on the 28/08/2017. On the hearing date the ruling was delivered appointing the respondent administrator of the estates of the late Bethalina Agrey Mwalukasa. The administrator collected the estates and dully divided them to the beneficiaries including the applicant before he reported the said division to the trial court on the 20/12/2018 and the probate closed. On the 27/03/2019 when the administrator of estates returned the division form number VI, the applicant was present and registered his dissatisfaction of the alleged division of estates and the way the proceedings were conducted without being informed. Following that complaint the trial court ruled out that the applicant should sue the respondent challenging the division of the estate. Discontented the applicant unsuccessfully filed an application for revision in the District Court of Kinondoni through Misc. Application No. 154 of 2019 which was dismissed for want of merit in its decision delivered on

28/02/2020. Aggrieved with the decision could not appeal in time hence this application for extension of time within which to file the appeal to this court.

Both parties in this matter are represented. The applicant is represented by Mr. Francis Munuo learned Advocate whereas the respondent is enjoying the services of Mr. Benson Pascal Ngowi learned advocate. When the application came for hearing parties opted to proceed with hearing by way of written submission and the court issued the filing schedule orders which were complied with.

I wish to state from the outset and before addressing the merits and demerits of this application that, the applicant for unexplained reasons cited some provisions from the Civil Procedure Code, [Cap. 33 R.E 2019] and the Law of Limitation Act, [Cap. 89 R.E 2019] among other provisions to move this court to grant the application. The two enactments do not apply to the matters originating from the Primary Court. However, taking into consideration the fact that he has cited other provisions of the law that empowers this court to entertain the matter and imposing the principle of overriding objectives aiming at disposing of matters without being bound by technicalities, I have decided to proceed entertaining the application.

Both parties in their submissions submitted and this court agree with them that it has powers to extend time upon good cause shown by the applicant. And what amounts to good cause cannot be laid down by fast and hard rules as it depends on the reasons advanced by the party seeking an extension. This position of the law is stated in plethora of authorities one of which is **Oswald Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil

Application No. 13 of 2010, (CAT-unreported) cited with approval in the case of **Andrew Athumani Ntandu and Another Vs. Dustan Peter Rima** (As Legal Administrator of the Estates of the Late Peter Joseph Rima), Civil Application No. 551/01 of 2019 (CAT-unreported) where the Court of Appeal stated:

*"What constitutes good cause cannot be laid down by any hard and fast rules. The term "good cause" is a relative one and is dependent upon the party seeking extension of time to provide the relevant material in order to move the court to exercise its discretion."*

It is also trite law that when discharging this mandatory duty of assigning good cause to the court for it to exercise its discretion judiciously, a party has to account for each and every day that passed beyond the prescribed period of time. This was the position in the case of **Alman Investment Ltd Vs Printpack Tanzania and Others**; Civil Application No. 3 of 2003 (Unreported) that;

*"Applicant ought to explain the delay of every day that passed beyond the prescribed period of limitation."*

Discharging the duty of assigning good cause for the delay Mr. Munuo for the applicant having adopted the applicant's affidavit stated that the decision sought to be impugned was delivered on the 28/02/2020, copies of ruling of the court applied and delivered to the applicant on 13/03/2020. He said, bringing into play the provision of section 19(2) of the law of Limitation Act, [Cap. 89 R.E 2019] on exclusion of the period which the applicant was

waiting to be supplied with ruling the appeal should have been filed on 14/04/2020. However, the applicant found himself time barred and on the 17/04/2020, two (2) days after the time limitation for filing the appeal lodged this application. To him two days is not inordinate. Opposing this ground Mr. Ngowi for the respondent submitted that, the Law of Limitation Act, has been wrongly applied by the applicant since this matter is originating from the Primary Court where it is not applicable. On the reasons for delay he argued the ruling kept the applicant waiting is not a mandatory document to accompany the appeal so he ought to have filed the appeal right away. He added that, even if it is to be taken that the applicant collected the ruling on 13/03/2020 which he submits there is no proof of, still he has failed to account for what failed him to file the appeal after collection of the ruling for all those days until when he found himself time barred.

It is true and I agree with Mr. Ngowi that, the Law of Limitation Act does not apply in this application and I would add the Civil Procedure Code. And that, the applicant has failed to assign reasons as to what caused him to delay to file the appeal for more than 30 days from 13/03/2020 the date when he received the ruling until 17/04/2020 when this application was file. To me all these days cannot be said not be inordinate period of time. This ground fails and I dismiss it.

Apart from that ground the applicant in his submission relied on ground of illegality of the decision on the points that, the trial court lacked jurisdiction to try the matter, denial of appellant's right to be heard for want of proper citation/notice as required by the law, probate proceedings were time barred, the proceedings in the trial court were tainted with fraud and

irregularities on the dates of the proceedings. It is trite law that, illegality of the decision in itself if established can constitute good cause for extension of time regardless whether sufficient reasons for delay have been put forward by the party. This position of the law was well adumbrated in the case of **Ezron Mageza Maryogo Vs. Kassim Mohamed Said and Another**, Civil Application No. 227 of 2015, CAT at Dar es salaam (Unreported) at page 12, where the court cited with approval the decision in the case of **VIP Engineering Marketing Limited and 2 Others Vs. CIT Bank Tanzania Limited**, Consolidated Reference No. 6,7 and 8 of 2006 and held that:-

*'... a claim of illegality of the challenged decision constitutes sufficient reason for extension of time regardless of whether or not a reasonable explanation has been given by the applicant to account for delay.'*

As alluded earlier on the ground of illegality the applicant has raised five points. I have chosen to start with the second point where the applicant is claiming on illegality of the decision, on the point that his to right to be heard was denied for want of proper citation/notice as required by the law. It is Mr. Munuo's contention on this point that the law under Rule 5(2) of the Primary Courts (administration of Estates) Rules, GN. 49 of 1971 notice has to be issued to all persons known or alleged to be close to the deceased person or named in the will requiring their appearance before the court on such specified date and time. He said, no notice was ever been issued to the applicant before the court ordered for substituted service through publication on the 21/02/2017. That apart, he lamented further that, the case continued on the 28/02/2017 only three days after publication of the notice in the

newspaper on the 25/02/2017. On the hearing date the trial court did not satisfy itself whether or not the order was adhered to and to what extent before proceeding to hear and grant the petition in absence of the applicant, thus denying him his constitution right of being heard as he appeared in court on the 27/03/2019 when the respondent submitted in court form No. VI and raised that concern, Mr. Munuo lamented. He stated that, the denial of that right to the applicant occasioned miscarriage of justice and rendered the trial a nullity. He therefore prayed the court to find the point of illegality not only raised but also established.

On his part Mr. Ngowi for the respondent challenged Mr. Munuo's stance submitting that, the applicant is aiming at abusing court process. He had it that, the court summon was served to the applicant who throughout the proceedings appeared in court and had his submission recorded. He cannot therefore be heard complaining of being unheard. On the issue of publication being made on the 25/02/2017 and hearing conducted on the 28/02/2017 he said, that did not occasion miscarriage of justice either as the proceedings did not last that day therefore interested party could have intervened at any stage. He also prayed this ground to be dismissed.

I have paid due consideration to the contesting submissions by the learned counsels from both parties. It is not in dispute that under Rule 5(2) of the Primary Courts (administration of Estates) Rules, GN. 49 of 1971 notice/summons has to be issued by the trial court to the parties concerned with the matter or in alternative citation be made. In this matter at page 9 of its judgment the District Court when considering applicant's complaint of denial of his right to be heard observed that, citation was made on the

25/02/2017. However, as submitted by Mr. Ngowi, the District Court also noted, the applicant was present in court when the proceedings were going on but never raised any objection on the matter, thus dismissed the applicant's complaint which he is still intending to pursue in this court if this application is granted. To ascertain Mr. Ngowi's assertion and the District Court's findings this court visited the typed proceedings of the trial court. What is noted in the Coram of the court on the 28/02/2017 is that heirs (warithi) were present. A mere recording that heirs are present to me is not a proof that the applicant was present when the proceedings took place. What is evident and recorded in the proceedings is that he entered appearance in court on the 27/03/2019 and registered his dissatisfaction including the conduct of the proceedings. As to whether the proceedings continued in the presence of the applicant as submitted by Mr. Ngowi and found by the District Court, thus accorded the applicant an opportunity to raise objection, it is the finding of this court that contention and finding of District Court does not find justification in the typed proceedings since the same indicates hearing was conducted on the 28/02/2017 and ruling delivered on the same date. There was no opportunity therefore for the applicant to raise objection concerning the appointment of the administrator as he appeared in court after closure of the probate and on the day of submission of the division form No. VI. For those reasons coupled with a short notice of three days before hearing started, this court is satisfied that the applicant has sufficiently established the point of illegality of the proceedings for being denied of his right to be heard. Failure of the court to afford a party an opportunity of exercising his right to be heard constitutes



an illegality. In the case of **Andrew Athumani Ntandu and Another Vs. Dustan Peter Rima** (As Legal Administrator of the Estates of the Late Peter Joseph Rima), Civil Application No. 551/01 of 2019 (CAT-unreported) where the Court of Appeal discussed how can denial of the right to be heard amount to illegality, the Court said:

*“The right to be heard is one of the fundamental rights of litigants in a trial and therefore, failure by the trial court to give the parties the right to be heard is an illegality. Moreover, it is settled law that a claim of illegality of the impugned decision constitutes good cause for extension of time regardless of whether or not reasonable explanation has been given by the applicant to account for delay.”*

That being the position even without further considering other points raised, I am satisfied and therefore inclined to hold that the applicant has successfully established good cause to warrant this court exercise its discretion to grant the application. This application therefore has merit and the same is hereby granted. The applicant is given extension of twenty one (21) days from the date of this ruling to file his appeal.

It is ordered that costs should follow the event.

It is so ordered.

DATED at DAR ES SALAAM this 16<sup>th</sup> day of October, 2020.



E. E. KAKOLAKI

**JUDGE**

16/10/2020

Delivered at Dar es Salaam today on 16/10/2020 in the presence of Ms. Hawa Turusia advocate for the respondent assisted by Ms. Nancy Ngoiya advocate, Mr. Benson Ngowi, advocate for the applicant and Ms. Lulu Masasi, court clerk.

Right of appeal explained.



E. E. Kakolaki

**JUDGE**

**16/10/2020**