

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

**AT DAR ES SALAAM**

**MISC. CIVIL APPLICATION NO. 726 OF 2017**

[Arising from the ruling in Misc. Civil Application No. 718 of 2015 –

**W.B Korosso J** (as she then was) dated 10<sup>th</sup> February 2017

(Under PC Civil Appeal No. 33 of 2014)]

**THE REGISTERED TRUSTEES OF THE**

**AFRICAN INLAND CHURCH OF TANZANIA ..... 1<sup>st</sup> APPLICANT**

**MAMBA AUCTION MART..... 2<sup>nd</sup> APPLICANT**

**VERSUS**

**OMARY SALUM SADALA ..... RESPONDENT**

**RULING**

3<sup>rd</sup> Mar & 27<sup>th</sup> Mar, 2020.

**E. E. KAKOLAKI J**

In this application the applicants are seeking an extension of time to file a Notice of Appeal to the Court of Appeal out of time against the decision of this Court by Hon. W.B. Korosso J (as she then was) dated 10<sup>th</sup> day of February, 2017 in Misc. Civil Application No. 718 of 2015 (Under PC Civil Appeal No. 33 of 2014) and for an order that costs be

provided for. The application has been brought under Section 11(1) of the Appellate Jurisdiction Act, [Cap. 141 R.E 2002] at the instance of the applicants supported by affidavit of **Rev. Elisha Isebuka**, Principal Officer of the 1<sup>st</sup> applicant. It has not been opposed by the respondent despite of proof of service as he neither filed his counter affidavit nor prayed for extension of time to so do. However when the matter came for hearing the respondent asked for the right to reply which the court granted in the interest of justice and for availing him fair hearing of the matter especially on the matters of law despite of that right being challenged by the applicants.

When the application was called on for hearing before me parties were represented. **Mr. Casmir Nkuba** learned advocate appeared for the 1<sup>st</sup> and 2<sup>nd</sup> applicants whereas **Mr. Yahaya Njama** learned advocate represented the respondent.

In order to appreciate the sequence of events in this matter it is incumbent for me to state its background albeit so briefly as reduced from the affidavit in support of the application. In Probate Cause No. 35 of 2008, the respondent was appointed the administrator of estates of his father the late Salum Ally Sadaka by Temeke Primary Court whilst Ally Salum Sadala and other members of the family remained beneficiaries of the estates. In the course of administration of those estates upon request of parties the Temeke Primary Court issued a sale order of the house located at Sokota area, Temeke District within Dar es salaam Region registered as Land No. TMK/TMK/TMK20/34 under a Settlement Licence No. TMK000646, the proceeds of which were to be distributed to the beneficiaries. It went further to appoint the 2<sup>nd</sup> applicant a court broker dully registered to execute the said court order.

Public auction was conducted on the 20/09/2008 whereby the 1<sup>st</sup> applicant participated and emerged the highest bidder with a last bid of Tshs. 40,000,000/= which was paid to the Primary Court of Temeke and duly distributed to the beneficiaries. Aggrieved by sale order and appointment of the court broker the respondent lodged with Temeke District Court an application for Revision No. 15 of 2009 against the applicants joining Ally Salum Sadala the application which was dismissed for want of merits. Being aggrieved by the decision of the District Court the respondent appealed to the High Court vide PC Civil Appeal No. 33 of 2014 which allowed the appeal by setting aside the primary court decision and entered the following orders. That:

- (a) The 3<sup>rd</sup> Respondent (1<sup>st</sup> Applicant herein) should hand over the suit property to the Respondent therein or negotiate an amicable settlement within three months;
- (b) The Primary Court should refund the 3<sup>rd</sup> Respondent (1<sup>st</sup> Applicant herein) the money deposited with it upon impugned sale of the suit property;
- (c) The 3<sup>rd</sup> Respondent (1<sup>st</sup> Applicant herein) is at liberty to take all lawful measures necessary to recover its money and claim compensation in case of any loss suffered.

The applicants being aggrieved with the decision of this Court in PC Civil Appeal No. 33 of 2014 on 17/11/2015 filed a Notice of Appeal seeking to challenge that decision to the Court of Appeal. Subsequent to that the applicants lodged an application in this Court in Misc. Civil Application No. 718 of 2015 for certification that the point of law was involved in the impugned decision of the High PC Civil Appeal No. 33 of 2014 the application which was dismissed for being devoid of merit. Aggrieved the

applicants on 05/05/2017 knocked the Court of Appeal doors through Misc. Civil Application No. 208/01 of 2017 seeking for an order of extension of time within which to file an application for certificate that appoint of law is involved in the decision of the High Court in PC Civil Appeal No. 33 of 2014. However upon thorough thought on the propriety of the application the same was withdrawn by the applicants on the 1/11/2017 to enable them take appropriate legal steps as it was wrongly filed there. It is from that fact the applicants filed the present application seeking an extension of time to file a Notice of Appeal to the Court of Appeal out of time against the decision of this Court by Hon. W.B. Korosso J (as she then was) dated 10<sup>th</sup> day of February, 2017 in Misc. Civil Application No. 718 of 2015 which decision dismissed their application for certification that the point of law was involved in the impugned decision of the High PC Civil Appeal No. 33 of 2014.

In applications of this nature for extension of time this court is vested with discretion to extend time even where the prescribed time has expired upon "good cause" shown. However, what amounts to "good cause" the Court of Appeal in the case of **Jumanne Hassan Bilingi Versus The Republic**, Civil Application No. 23 of 2013 (Unreported) cited in the case of **Ms. Henry Leonard Maeda and Another Versus Ms. John Anael Mongi and Another**, Civil Application No. 31 of 2013 stated that:-

*"In essence, what amount to good cause is upon the discretion of the Court and it differs from case to case. But, basically various judicial pronouncements defined good cause to mean reasonable cause which prevented the*

*applicant from pursuing his action within the prescribed time”.*

The applicants therefore are expected to establish reasonable cause that prevented them from pursuing this application within the prescribed time. This is from 10<sup>th</sup> day of February, 2017 the time when Misc. Civil Application No. 718 of 2015 was dismissed by this court until when this application was filed on the 23/11/2017.

It was stated by Mr. Nkuba learned advocate for the applicants that on 25/09/2015 the applicants filed application in this court Misc. Application No. 718 of 2015 seeking for an order of the court certifying that a point of law is involved in the decision of this court in PC Civil Appeal No. 33 of 2014 where five grounds were raised as stated in paragraph 13 of the affidavit in support of this application but the same was dismissed for want of merits. Being aggrieved and instead of appealing to the Court of Appeal inadvertently filed the application in the Court of Appeal Misc. Application No. 208/01 of 2017 thinking that that was the right remedy for them.

Mr. Nkuba contended further that when the matter came for hearing before the Court of Appeal on 1/11/2017 after a lengthy discussion between the parties and the presiding judge it was resolved that the matter was improperly before the Court, as a result the applicants decided to withdraw it without costs. Upon that withdrawal and after obtaining the court's order the applicants immediately filed the present application.

Mr. Nkuba argued that this court has discretionary powers to grant extension of time. And that in doing so should be guided by the decision

in **Gibb Eastern Africa Versus Syscon Builders Ltd and Two Others**, Civil Application No. 5 of 2005 where the Court of Appeal cited with approval the case of **Costellow Vs. Somerset County Council** (1993) 1WLR 256 which case Sir Thomas Buigham, M.R. stressed at page 263 that a plaintiff or applicant should not in the ordinary way be denied an adjudication of his claim on merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate . In this application there are serious issues in the form of point of law which require determination of the Court of Appeal for justice to be done, he stated. Expounding on the point of law Mr. Nkuba stated that the decision in Misc. Civil Application No.33 of 2014 which this court denied the applicants an opportunity to challenge in the Court of Appeal in Misc. Civil application No. 718 of 2015 sought to be appealed against now contained illegality for disregarding the powers of the Primary Court in the Probate and Administration of Estates as provided by The Primary Courts (Administration of Estates) Rules, GN. No. 49 of 1971. That under these rules the Primary Court has powers to entertain the administration of estates when it deems necessary to so do. He was of the view that illegality if established amounts to good cause and invited this court to so find. And that illegality when established the applicant deserves an opportunity to pursue it as that stand of the law is provided in the case of **Selina Chibago Vs. Finihas Chibago**, Civil Application No. 182 "A" of 2007 where the Court of Appeal quoting with approval the case of **Principal Secretary Ministry of Defence and National Services Vs. Dervam Valambhia** (1992) TLR 182 at page 189 had this to say:

*“In our view, when the point at issue is one alleging illegality of the decision being challenged the **Court has a duty**, even if it means extending the time for the purpose, to ascertain the point and, if the alleged illegality be established, to take appropriate measures to put the matter and the record right.”*[Emphasis ours]

Basing on that sound decision Mr. Nkuba contended that since the alleged illegality in Misc. Civil Application No. 33 of 2014 was left unrevised which is to the detriment of the applicants this court is invited to find that it constitutes good cause to warrant extension of time.

On another point Mr. Nkuba contended that the filing of Misc. Application No. 208/01 of 2017 was done inadvertently basing on misconstruction of rules 44 and 45 of the Court of Appeal Rules, 2009. However upon noticing the error the applicants acted reasonably and before going to the full hearing of the application decided to withdraw the application hence immediate filing of the present one. The applicants therefore acted diligently at all time of pursuing their rights, he submitted.

On the respondent’s side despite of failure to oppose the application by filing the counter affidavit Mr. Njama counsel for the respondent pointed out right from the beginning that the respondent was objecting the application. He started with the issue of illegality by submitting that the same was not deposed in the applicants’ affidavit. But since it is a point of law the learned counsel for the applicant should have stated it clearly in his submission how does it arise, he stressed. On the cited Primary Court rules to suggest that the primary courts have powers to

administer estates he was of the view that the applicant failed to tell how and where is it shown that the primary court has those powers. The assertion by the applicants that the decision in Misc. Civil Application No. 33 of 2014 contains illegality should not be used as a back door to seek grant of extension of time as there must be some concrete material facts that the court will use to make assessment that the issue of illegality arises in which case the applicants have failed to advance, Mr. Njama argued. Mere allegations without proof should not be considered as sufficient ground for extension of time by this court, he submitted.

Mr. Njama went on to attack the second reason by the applicants in that the filing of Misc. Application No. 208 Of 2017 was done inadvertently for the applicants misconstrued rules 44 and 45 of the Court of Appeal Rules, 2009. On this he was of the view that counsels to the Court of Appeal are expected to conduct a thorough research before filing anything in court. To him the alleged inadvertence by the applicants was nothing but negligence. Inadvertence as per online **Merriam Webster Dictionary** means inattention, oversight and or unintentional, he advised. He contended further that the applicants admit that they withdrew their application because of its incompetence before filing the present one. On this he was of the view that filing wrong application to the Court of Appeal does not amount to good cause for extension of time. To bolster his argument he referred this court to the decision of **Miraji Ayubu Kimeza Versus Jumanne Musa Kimeza**, Misc. Civil Application No. 748 of 2018, where Hon. Munisi J declined to admit multiplicity of cases prosecuted by the applicant as reason for extension of time. Another case cited was of **William Shija Versus Fortunatus Masha** (1997) TLR 213 (CA) where the Court held that the applicant's



advocate conduct of being negligent in adopting the correct procedure could not constitute sufficient reason for the exercise of the court's discretion. He submitted that filing wrong application under that authority amounted to negligence. He also cited the case of **Martine Vs. Anderson** (2006) 1EA (CAT) to support that position. Lastly Mr. Njama stated that advocate's mistake is also considered as negligence which does not constitute sufficient reason as per the case of **Said Salim Bakhresa Vs. Ally A. Ngume** (1997) TLR 312. He finally submitted that the applicants and their advocate acted negligently and no diligence was shown by them. Thus there were no good causes advanced for the applicant to warrant this court exercise its discretion to extend time as prayed. He therefore invited this court to dismiss the application with costs.

I appreciate the efforts shown and submissions made at length by the learned advocates for both sides. Having said so, I now turn to consider whether the applicants have advanced good cause to warrant this court exercise its discretion to extend time to file a notice of intention to appeal to the Court of Appeal out of time as prayed. In discharging this duty Mr. Nkuba counsel for the applicants convincingly submitted that the decision in PC Civil Appeal No. 33 of 2014 which this court denied the applicants an opportunity to challenge to the Court of Appeal in its decision in Misc. Civil application No. 718 of 2015 contained illegality as it was arrived at in disregard of the Primary Court powers in the Probate and Administration of Estates as provided by The Primary Courts (Administration of Estates) Rules, GN. No.49 of 1971. To him this illegality amounts to sufficient reason or good cause as leaving that

wrongly decided decision unchallenged and rectified by the Court of Appeal would mean retaining a bad precedent which also affects applicants' rights. In reply Mr. Njama faulted Mr. Nkuba on this point of illegality that he premised his argument on mere assertion without giving material evidence to assist the court to make assessment whether illegality exists or not. He thus prayed the court to find that no good cause has been established by the applicants. In rejoinder Mr. Nkuba stated that rules of the Primary Courts confer powers to the Primary Court under Rule 8 (f) to intervene and order sale of any property under the administration of estates. He stemmed his argument by referring this court to the case of **Catherine Ikombe Vs. Benard Ikombe and 4 Other**, Pc Probate Civil Appeal No. 8 of 2015 reported in (2017) TLS RL 166 which stated that the primary court could intervene the process of sale of estate. I have had an opportunity of perusing the said rule 8(f) of The Primary Courts (Administration of Estates) Rules, GN. No.49 of 1971 to satisfy myself whether it confers power to the Primary Courts to administer estates including sale when the circumstances demand so. To appreciate its gist it is instructive that I reproduce it. The same reads:-

*R.8. Subject to the provisions of any other law for the time being applicable the court may, in the exercise of the jurisdiction conferred on it by the provisions of the Fifth Schedule to the Act, but not in derogation thereof, hear and decide any of the following matters, namely:-*

*(a) .....(NA);*

(b) .....(NA);

(c) .... (NA);

(f) **any question relating to the sale, partition, division or other disposal of property and other assets comprised in the estates of the deceased person for the purpose of paying off the creditors or distributing the property and assets among the heirs or beneficiaries,**[Emphasis is mine]

Under that rule I entertain no doubt that the Primary Court can intervene and order sale of the deceased estates depending on the circumstances of the case as rightly submitted by Mr. Nkuba when arguing on the point of illegality of the decision of this court in PC Civil Appeal No. 33 of 2014. The Court of Appeal in the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No. 2 of 2010**, on the issue of illegality observed:

*"Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it can not in my view, be said that in VALAMBIA's case, the court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should, as of right, be granted extension of time if he applies for one. **The court there emphasized that such point of law must be that of sufficient importance and, I would add that it must also be apparent on the face of record, such as the question of jurisdiction; not one would be discovered by a long drawn argument or process.**"*

In this application it has been rightly submitted by Mr. Nkuba that the powers of Primary Court in entertaining and ordering sale of the deceased estates where the circumstances so calls touches the jurisdiction of the court and it was not considered by this Court when arriving in its decision in PC Civil Appeal No. 33 of 2014, which to me constitutes an illegality of the decision apparent on the face of record that calls for the Court of Appeal's intervention to take appropriate measures to put the matter and the records right if so pleased as per the decision in **Selina Chibago** (supra). And the Court of Appeal cannot have that opportunity unless this application is granted to pave a way for applicants to challenge the decision of this Court in Misc. Civil application No. 718 of 2015 which if successfully challenged the applicants shall later assail the alleged illegality in PC Civil Appeal No. 33 of 2014 for rectification by the Court of Appeal. Mr. Njama wanted this court to examine whether the conditions provided under rule 8(f) were met. With due respect to Mr. Njama I am not prepared to fall in that trap as for so doing in my view will amount to discharging the duty of Court of Appeal in as far as the intended appeal is concerned. The mere fact that illegality has been successfully shown is sufficient for me to hold that the same deserves consideration of the Court of Appeal as this court's only duty is to extend time for the applicant to file the Notice of Appeal for appeal purposes before the Court for consideration as it was held in the case of **Dervam Valambhia** (supra).

The issue of illegality alone if successful established can constitute good cause for this court to extend time within which to file notice of appeal to the Court of appeal against the impugned decision notwithstanding the fact that the reasons advanced are insufficient. This was the position

in the case of **Ezron Magesa 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 where the Court 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'.*

Assume the ground of illegality is not successful established still this court in exercising its discretion has to consider the circumstances of each case to establish whether good cause has been shown or not. In this application having considered the fact that there is existence of orders issued by this court in PC Civil Appeal No. 33 of 2014 including that of the primary court to refund to the 1<sup>st</sup> applicant the money deposited with it upon impugned sale of the suit property in Probate Cause No. 35 of 2008 already distributed to the beneficiaries for want of the primary court's jurisdiction to administer estates the decision which is sought to be challenged by the applicant, I am convinced that the circumstances of this case and interest of justice would requires that extension of time be granted to avail the applicants with an opportunity to bring into attention of the Court of Appeal that point of law for determination.

Now basing on the above reasons and since it is in the discretion of this court to grant the application for extension of time upon good cause

shown which in my opinion has been established by the applicants, I see no pressing issue to consider other reasons. In the circumstances and for the foregoing reason, I find that the applicants have successfully established good cause to warrant this court to extend time for filing the Notice of Appeal as prayed. I hereby allow the application and extend time as prayed. The applicants are to file the said Notice Appeal within 14 days from the date of his ruling.

It is so ordered.

DATED at DAR ES SALAAM this 27<sup>th</sup> day of March, 2020.

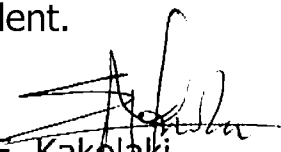


E.E. KAKOLAKI

**JUDGE**

27/03/2020

Delivered at Dar es Salaam this 27<sup>th</sup> day of March, 2020 in the presence of **Mr. Casmir Nkuba** learned advocate for the Applicant and **Mr. Mohamed Shaban** learned advocate holding brief for Mr. **Yahaya Njama** advocate for the respondent.



E. E. Kakolaki

**JUDGE**

**27/03/2020**