

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

MISC.CIVIL APPLICATION NO 211 OF 2019

(Arising from Kinondoni District Court, Probate Appeal No 23 of 2018
before Hon. Mwingira RM, dated 15th February, 2019)

ROSE COSTA MWANACHE.....APPLICANT

VERSUS

ROBERT G. MWANACHE.....1ST RESPONDENT

MARTIN G. MWANACHE.....2ND RESPONDENT

HERBERT G. MWANACHE.....3RD RESPONDENT

RULING

MASABO J, L.:-

Before me is an application for extension of time to appeal against the judgment and decree of Kinondoni District Court delivered on the 15th February, 2019. The application was made by chamber summons supported by an affidavit sworn by the Applicant, Rose Costa Mwanache, in which she deposes the grounds upon which the application rests. What can be discerned from the Applicants affidavit is that, on 31st March 2018, Kinondoni Primary Court appointed the Applicant herein an administrator of the estate of Godfrey Steven Mwanache who died interstate on 13th July 2010 being survived by a widow (the applicant herein) and several children, the

Respondents inclusive. The respondents were not happy with the appointment. They appealed before the District Court of Kinondoni which on 25th February, 2019 revoked her appointment and appointed Andrew Godfrey Mwanache and Herbert Mwanache as joint Administrators. The revocation disgruntled her but she took no action until 15th April 2019 when she lodged this appeal seeking for extension of time. Her grounds for application as could be discerned from paragraph 8, 9 and 12 of the affidavit are that, First, there is a point of law requiring to be determined by this court, and second, she could not timely file the appeal owing to the depression she suffered as a result of factors connected with the administration. The application was sternly contested by the Respondent through their counter affidavit filed in court on 23rd May 2019.

The Applicant was represented by Mr. Cleophas James, learned counsel whereas the Respondents appeared in person after their counsel, one Mr. Seleman Almas was disqualified.

For the Applicants, Mr. James while submitting in support of the application silently abandoned the issue of illness. He zeroed his submission on the point of illegality in support of which it was argued that, the illegality is centered on the fact that Andrew Godfrey Mwanache who was appointed as a co-administrator had no interest to this matter having disqualified himself from the case through his letter dated 16th October 2018, hence, was legally not party to the suit. It was further argued that the revocation did not comply with the rules regulating the probate matters which does not vest district court with powers to revoke the appointment done by primary court and to subsequently appoint another administrator in replacement. In so doing, it

was argued, the court usurped the powers of the primary court hence an illegality because, legally, the district court having found that there were irregularities it ought to order that the matter be heard *de novo*.

Having outlined the illegality, Mr. James proceeded to submit that it is now a settled law that illegality constitutes, in itself, a good ground for extension of time. Numerous authorities were cited to fortify this point and they include the case of **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185 (CAT); **Mohamed Salum Nahdi v Elizabeth Jeremiah** Civil Reference No 14 of 2017 CAT (UNREPORTED), **Selina Chibago V Finihas Chibago**, Civil Application No 182 "A" of 2007 (CAT)(unreported), and **Amour Habib Salim v Husein Baffagi**, Civil Application No. 52 of 2009 (CAT) (unreported) and many others which I need not cited here as they are already on record.

The Respondents vehemently resisted the submission. They filed a 22-page submission through which they gave a long account of the factors antecedent to the revocation of the letters. They also gave a detailed account of the provisions of the law regarding the jurisdiction of the district court to revoke the letters of administration and to subsequently appoint a new administrator in replacement, which in my considered view, was largely misplaced. Relevant to this application was the submission that the application is unfounded as the Applicant has failed to demonstrate a good cause in that her assertions in respect of ill health are not supported by any evidence and she has failed to account for the days of delay. Regarding to the illegality and subsequent appointment of new administrators, the relevant submission was that the explanation advanced by Respondent does

not meet the test stated in the **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185 (CAT). In summary, their argument was that as held in **Valambhia's case**, for the point of illegality to be regarded as a sufficient ground for extension of time, the point so raised:

“...must be of sufficient importance and apparent on the face of record such as the question jurisdiction; should not be one that would be discovered by a long drawn argument or process”

It was argued further that, this point was fortified in the case of **Lyamuya Construction Company Ltd v Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application No. 2 of 2010 (CAT) (unreported); **Omary Ally Nyamalege (as administrator of the estate of the late Seleman Ally Nyamalege) and 2 others v Mwanza Engineering Works**, Civil Application No. 94/8 of 2017. Based on these authorities he prayed that this application be dismissed owing to the Applicant's failure to demonstrate, in the face of record, the illegality claimed.

Based on **Lyamuya Construction Company Ltd** (supra) it was submitted further that, it is a requirement that the for the discretionary powers in respect of extension of time to be said to have been judiciously exercised, the applicant must account for each day of delay and since in this application the applicant has not accounted for the time, her application should be dismissed.

In rejoinder the Applicant reiterated his submission on the ground of illegality and cited a recent decision of the Court of Appeal in **Samwel Munisiro v Chacha Mwikwabe**, Civil Application No. 539 of 2019.

I have considered the arguments advanced by both sides in their lengthy submissions as supported by numerous authorities which I have painstakingly read. Looking at the bulky of the authorities cited by the parties and those not cited but relevant, I need not emphasize that, the law with regard to extension of time is highly developed and the applicable principle, are certainly, not difficult to find. The first of such principles is that for expeditiousness and finality of litigations, the rules of procedure prescribing time within which a litigant is to take a certain legal action must be obeyed and strictly complied with (**Ratnam v. Cumarasamy** (1964) 3 All ER 933).

Second, where a litigant is hindered by a valid cause to comply with the time limitation, his right will be protected by provisions vesting in courts of law, discretionary powers to extend the time. In the instant case, such provisions comprise section 25(1)(b) of the Magistrate Courts Act Cap 11 RE 2019, and section 14 of the Law of Limitations Act, Cap 89. The former provides that:

(b) in any other proceedings any party, if aggrieved by the decision or order of a district court in the exercise of its appellate or revisional jurisdiction may, within thirty days after the date of the decision or order, appeal therefrom to the High Court:

Provided that the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired

The latter provides as follows:

14.-(1) Notwithstanding the provisions of this Act, the court may, for any reasonable or sufficient cause, extend the period of limitation for the institution of an appeal or an application, other than an application for the execution of a decree, and an application for such extension may be made either before or after the expiry of the period of limitation prescribed for such appeal or application. (2) For the purposes of this section "the court" means the court having jurisdiction to entertain the appeal or, as the case may be, the application.

The powers in these two provisions being discretionary must be exercised judiciously. In other words, the exercise of this jurisdiction is predicated upon the Applicant's ability to avail the Court with material facts on which the court can exercise discretion. The Applicant must therefore demonstrate a good cause. Articulating this Principle, the Court of Appeal in ***Benedict Mumello v Bank of Tanzania***, Civil Appeal No 12 of 2012 (unreported) stated that:

"It is trite law that an application for extension of time is entirely in the discretion of the court to grant or refuse it, and that extension of time may only be granted where it has been sufficiently established that the delay was with sufficient cause

The rule is specifically meant to prevent unscrupulous litigants from exercising unqualified right to an extension of time which would entirely defeat the purpose of the rules which is to provide for a timetable for the conduct of litigation (***Ratnam v. Cumarasamy***, (supra).

Therefore, the paramount consideration in this application is whether or not the Applicant has demonstrated a good cause to warrant the exercise of the discretionary powers vested in this court by the two provisions above. This lands us on another principle which is basically to the effect that since there is no universal definition of the term good cause, in determining whether or not a good cause has been established, several factors should be taken into and they include; whether the applicant has accounted for all the period of delay, whether the delay is inordinate; whether the applicant has demonstrated diligence and not apathy, negligence or sloppiness in prosecution of the action; and existence of a point of law or sufficient importance such as the illegality of the decision sought to be challenged (See **Lyamuya Construction Company Limited Vs Board of Registered Trustees of Young Women's Christian Association of Tanzania** (supra); also see **Zahara Kavindi and Another v Juma Swalehe & Others**, Civil Application NO. 4/5 OF 2017 (CAT at Mwanza)(unreported).

In the instant case, the delay is for a period of two months counted from 15th February 2019 when the impugned decision was handed down to 17th April 2019 when this application was filed. This is noticeably not an inordinate delay and if supported by good cause is, in my settled view, excusable. As rightly submitted for the Respondents, the Applicant has listed illness (depression) as the sole factor which inhibited her from pursuit of the appeal on time. However, as alluded to earlier, the Applicant's counsel silently abandoned this ground in the course of submission which implies that the

Applicant found it unworthy of pursuit. She zeroed down on the point of illegality. The abandonment of this ground certainly implies that the Applicant was not inhibited by any cause, good or bad, to lodge her appeal and this manifests lack of diligence on her party. Also, as correctly submitted by the Respondents, she has terribly failed to account for delay contrary to the legal requirement that the applicant must account for each day as articulated in **Bushfire Hassan vs Latina Lucia Masaya**, Civil Application No. 3 of 2007, Court of Appeal of Tanzania (unreported); **Mustafa Mohamed Raze vs Mehboob Hassanali Versi**, Civil Application No, 1168 of 2014,CAT (unreported) and **Lyamuya Construction Company Limited** (supra).

Since the Applicant has zeroed down on the point of illegality, the issue to be determined is whether this is a good cause to warrant the exercise of the discretionary powers stipulated above. The answer to this takes us to another principle to the effect that, where a point of law at issue in an application for extension is that of illegality of the decision that by itself constitutes a sufficient reason (see **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of TRI-Telecommunications (T) Ltd v Citibank**, Consolidated Civil Reference No. 6,7 and 8 of 2006, Court of Appeal of Tanzania (unreported) and in **Secretary, Ministry of Defence and National Service v. Devram Valambia** (supra) and other cases extensively cited by both parties. In the later case it was held that:

“ 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”

It is however to be noted that, as correctly argued by the Respondents and as it will be demonstrated below, the application of this rule is subject to certain principles as articulated in the case of **Lyamuya Construction Company** (supra) where it was stated as follows:

“Since every party intending to appeal seeks to challenge a decision either on points of law or facts, it cannot in my view, be said that in Valambhia’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 the record, such as the question of jurisdiction; not one that would be discovered by a long drawn argument or process”.

This principle has been confirmed in other decisions of the Court of Appeal including in the case of **Ngao Godwin Losero Vs Julius Mwarabu**, Civil Application No. 10 of 2015, Court of Appeal of Tanzania (unreported); **Omary Ally Nyamalege and 2 others v Mwanza Engineering Works (supra)**, and in **Samwel Munsiro v Chacha Mwikwabe**, Civil Application No. 359/08 of 2019 Court of Appeal at Mwanza (unreported).

On the strength of these authorities, what remains to be determined is whether or not the point raised is of sufficient importance and is be apparent on the face of the record. It would appear to me and as rightly argued by the Respondents that, the point of illegality as stated in paragraphs 8 and 9 of the affidavits is premised on the appointment of Andrew G. Mwanache as a- co administrator of the estate while he was not party to Probate Appeal No 23 of 2018. Upon perusal record of the District Court of Kinondoni the parties in Probate Appeal No 23 of 2018 therein were Robert G. Mwanache, Martin G. Mwanache, and Herbert G. Mwanache, (as appellants) and Rose Costa Mwanache (as Respondent) it is therefore an undisputed fact that Andrew G Mwanache was not a party the appeal. However, in my view this issue would not pass the test above especially because the appointment of administrators is not predicated upon one being a party to the probate cause.

I have also noted that in the course of submission, the Applicant added another limb to the alleged illegality to wit, the jurisdiction of the district court to appoint new administrators to which it was argued that the District Court being an appellate court had no jurisdiction to appoint new administrators hence the appointment contravened section 21 (1) of the Magistrates Courts Act, Cap. 11.RE 2002. I will strait forward reject this limb because, it was raised merely raised from the bar. The law is settled that submissions are not evidence hence should not be accorded weight if not based on affidavit or counter affidavit. The Court of Appeal while addressing a same scenario in **African Marble Ltd vs Tanzania Saruji Corporation**,

Civil Application No. 44 of 2000, Court of Appeal of Tanzania at Dar es Salaam, it held that:

“...In any case, as Mr. Kariwa contended, the issue on the point of law has been raised from the bar, it did not feature anywhere in the application, I reject it”.

Also, in **East Zone Tobacco Growers Cooperative Union Ltd vs Michael Junga**, Civil Application No. 10 of 2000, Court of Appeal at Mwanza, it was held that:

“ With due respect to the counsel,.....the allegations that the respondent has no means of satisfying the decree is made from the bar. As such it is not evidence and so it cannot be considered. It ought to have been made in the affidavit so as to give the respondent a chance to respond to it”

Likewise, in the instant application the allegation that the district court had no jurisdiction was made from the bar hence it is not evidence and can therefore not be entertained.

Accordingly, I dismiss the application. This being a probate matter, I will make no orders for costs.

DATED at DAR ES SALAAM this 28th day of May 2020




J.L. MASABO
JUDGE