

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**  
**IN THE DISTRICT REGISTRY OF MUSOMA**  
**AT MUSOMA**

**MISCELLANEOUS CIVIL APPLICATION NO 11 OF 2021**

**GABRIEL JOSEPH .....APPLICANT**

**VERSUS**

**AMBROSE GWASI MUKHOI.....1<sup>ST</sup> RESPONDENT**

**CHRISPINUS MASWI MUKHOI.....2<sup>ND</sup> RESPONDENT**

**FERDINAND JOSEPH MUKHOI.....3<sup>RD</sup> RESPONDENT**

*(Arising from PC Probate Appeal No.5/ 2020 before the High Court (T) at Musoma D/Registry,  
DC Revision No.5/2020 and originating from Probate Cause No.129/1993 before the Primary  
Court of Tarime at Urban)*

**RULING**

*10<sup>th</sup> May & 30<sup>th</sup> June, 2021*

***Kahyoza, J***

**Gabriel Gwasi Mukhoi**, (the applicant) is applying for extension of time to file a notice of appeal to the Court of Appeal. **AMBROSE GWASI Mukhoi, Chrispinus Maswi Mukhoi** and **Ferdinand Joseph Mukhoi**, (the respondents) opposed the application by filing a joint counter-affidavit. The applicant's grounds for delay to file a notice of appeal averred in his affidavit are that-

1. Being a retired person he had no financial capability of engaging an advocate, therefore it took him a lot of time to gather money in period from September, 2020 to 3<sup>rd</sup> March, 2021, when he afforded to engage the Firm of Rutabingwa & Co. Advocates;

2. That the period from 3<sup>rd</sup> March, 2020 to the date of filing the application was spent in drafting the documents and travelling from Dar es salaam to Musoma High Court Registry.; and
3. While in the effort to lodge the notice of appeal he was approached by the respondents trying to settle the matter amicably but then they refrained from such a move.

The respondents opposed the applicant's grounds of delay and deposed further that there was no any settlement under way.

The issue is whether applicant has adduced sufficient ground (s) for delay.

This matter has a checkered history. It suffices to say that all started in 1993 when the applicant petitioned to the primary court of Tarime District at Urban, for letters of administration of the estate of the late Joseph Chacha Mukhoi. The primary court appointed him. The late Joseph Chacha Mukhoi was the father of the parties to this matter. The applicant, the administrator of the estate of the late Joseph Chacha Mukhoi delayed to file final statement of accounts. He filed the same in 2015. The parties engaged in several legal squabbles which culminated into this Court's ruling dated 24<sup>th</sup> September, 2020. It is this Court's ruling dated 24<sup>th</sup> September, 2020, which the applicant seeks to appeal against.

This Court, in its ruling referred to above declared that the applicant failed to file final statement of account, nullified his appointment as the administrator of the deceased's estate. It further appointed all the parties to be the administrators of the deceased's estate and ordered them to file the inventory within two months of their appointment and the final statement of accounts within two months after filing the inventory. The

Court further directed the parties to cooperate to bring the administration of the estate of their father to rest or else be removed and another person competent to discharge that duty be appointed. The parties did not comply with any of the orders this Court issued, hence the current application.

**Is there sufficient reason to extend time?**

At the hearing, Mr. Thomas advocate represented the applicant and Mr. Waikama represented the respondents. In support of the application Mr. Thomas advocate submitted that the reason for the applicant's delay to file a notice of appeal are stated under paragraph 9 of his affidavit. He restated the grounds stated under paragraph 9 of the affidavit, which I reproduced above. He added that the applicant intends to appeal to the Court of Appeal so that it may determine whether it was lawful to nullify what the administrator had done.

The respondent's advocate prayed to this court to adopt the counter affidavit and added that the applicant did not adduce good ground(s) for delay. He submitted that financial hardship was not a good ground to support an application for extension of time. Further, the respondent's advocate contended that the applicant did not account for all period of delay. The fact that the applicant was trying to settle the matter out of court with the respondents was not a ground for not lodging a notice of appeal on time. Finally, he submitted that the issue of illegality raised by the applicant cannot support the application for extension of time but for application for certificate on point of law.

Having heard the rival submissions from the parties' advocate it is time to determine the issue whether the applicant adduced good reasons for delay. The test for determining an application for extension of time, is

whether the applicant has established some material amounting sufficient cause or good cause as to why the sought application is to be granted. See the case of **Regional Manager, TANROADS Kagera V. Ruaha Concrete Company Ltd** Civil Application No.96 of 2007 (CAT Unreported).

The first applicant's ground is that the delay to lodge a notice of appeal was due to financial hardship. The respondent's advocate submit that the financial hardship is not a sufficient ground to support an application for extension of time. I totally agree with him. It is trite law that lack of means or say financial hardship is not a sufficient reason for extension of time. See **Zebitisi Kawuku V. A. Karim (1938) 5 ECCA 37 and Halima Athuman V. Hamadi Masudi** PC Cr App. No. 50/92 Masanche, J. (Unreported). It was held in the former case that-

*"Ignorance of law, old age and lack of means are not good grounds for allowing an appeal out of time.*

In addition, Rustomji, **On Limitation**, Eight Ed. 2001 at page 27 had this to say on the position of the law that **Poverty not a good ground for delay and lack diligence:**

*"After the prescribed period has elapsed, the door of justice is closed and **no plea of poverty**, distress, ignorance or mistake **can be of any avail**. The general rule is that even a hard cash should not be allowed to disturb the law. **The rule must be enforced even at risk of hardship to a particular party**. The Judge cannot on equitable grounds enlarge time allowed by the law, postpone its operation, or introduce exception not recognized by it. Whatever sympathy a Judge may feel for litigation and*

*however dishonest and immoral the conduct of his opponent might have been in pleading the bar of limitation, the courts are warranted in introducing saving or exceptions which are not in the statute.” (Emphasis added)*

I find no merit and in the first ground to support the application for extension of time.

That done, I now consider the applicant's second ground for extension of time that he delayed to lodge a notice of appeal as the respondents approached him trying to settle the matter out of court. The respondents denied the applicant's averment. The parties gave two contradicting versions on oath. It is upon this Court to determine, which version is true. As pointed above, I directed, in Court's ruling appointing the appellant and all the respondents to administer the deceased's estate to co-operate to bring the administration of the estate to an end. I believe if there was no indication of settling the matter out of court, the applicant, who was the appellant and the judgment debtor, would have certainly appealed. I agree that there were efforts among the parties to amicably settle the matter.

The next question to answer is whether the fact there were efforts to settle the dispute amicably amounts to a good cause to extend time. It is trite law propounded in **Shanti V. Hindoche & Others** [1973] E.A. 207, that in applications for extension of time, the more persuasive reason an applicant can show is that the delay has not been caused or contributed by dilatory conduct on his part. That erstwhile East African Court of Appeal went on to hold that:-

*"The position of an applicant for extension of time is entirely different from that of an application for leave to appeal. He is concerned showing **sufficient reason why he should be given** more time and the most persuasive reason that he can show..... is that **the delay has not been caused or contributed to by dilatory conduct on his part**. But **there may be other reasons and these are all matters of degree**. He does not necessarily have to show that his appeal has a reasonable prospect of success or even that he has an arguable case".*

I am of the firm view that, in the circumstances of this case, which is that the administration of the deceased's estate commenced in 1993 until to date, the applicant's efforts to try to settle their difference was something to encourage. However, the Court of Appeal in the **M/S. P & O International Ltd V. The Trustees of Tanzania National Parks (TANAPA)** Civil Appeal No.265/2020 (CAT Unreported) reiterated its earlier position in decision in **Consolidated Holding Corporation v. Rajani Industries Ltd & Another**, Civil Appeal No, 2 of 2003 (unreported) that-

*".... **negotiations do not check the time from running**. The Court sought inspiration from a book by J.K Rustomji on the **Law of Limitation**, 5th Ed. to the effect that the statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties."*

The Court of Appeal further drew inspiration from a decision of the High Court at Dar es salaam in **Makamba Kigome & Another v. Ubungo Farm Implements Limited & PRSC**, Civil Case No. 109 of



2005(unreported) whereby Kalegeya, J (as he then was) made the following pertinent statement:

*"Negotiations or communications between parties since 1998 did not impact on limitation of time. An intending litigant, however honest and genuine, who allows himself to be lured into futile negotiations by a shrewd wrong doer, plunging him beyond the period provided by law within which to mount an action for the actionable wrong, does so at his own risk and cannot front the situation as defence when it comes to limitation of time.*

It is trite law that *the statute of limitation is not defeated or its operation retarded by negotiations for a settlement pending between the parties*. Thus, I am unable to find the applicant's contention that he delayed to file a notice of appeal because the respondents lured him to settle the matter out of court, a sufficient cause for delay. The applicant agreed to be lured at his own risks. It is settled that an application for extension of time may be granted where the applicant adduces sufficient cause for delay and not out of sympathy. (See **Daphne Parry v Murray Alexander Carson** (1963) E.A. 546.)

The applicant's advocate raised another issue that this Court acted without jurisdiction. He submitted that it appointed the administrator without jurisdiction to do so. He submitted further that the decision of this Court was not proper because it offended rule 9(2) of the **Primary Courts** (Administration of Estates) **Rules**, 1971 (the Rules), as acts done by the administrator are considered legal and must not be disturbed.

The respondent's advocate replied the issue of illegality raised by the applicant was not sufficient cause to support the application for delay. He submitted that the issues can be raised when a person is applying for certificate on point of law and not otherwise.

It is settled that the issue of illegality of the impugned decision is sufficient ground to support an application for extension of time. However, it is imperative that the alleged illegality must be apparent on the face of record. See the case of **Ngolo Godwin Losero v Julius Mwarabu** Civil Application No. 10/2015 CAT at Arusha (unreported), the Court of Appeal restated its position in **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania**, Civil Application 2/2010 that-

*"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 Valambia's case, the court meant to draw a general principle 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 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."*

In the apparent case, the applicant's advocate argued that this Court had no jurisdiction to appoint an administrator, and that this Court's decision offended rule 9(2) of the Rules.

The respondent's advocate was that the illegality raised was not sufficient cause to support an application for delay. The respondent's advocate's reply implies that there is illegality but it is not sufficient cause to support the application for extension of time.

Given the fact that both advocates agree that the alleged illegality do exist, I will extend time so that to the applicant to file a notice of appeal as prayed.



In the upshot, I find that the applicant has exhibited good cause for delay. Consequently, I allow the application. Time is extended within which to file notice of appeal. Costs shall be costs in due course.

It is ordered accordingly.



**J. R. Kahyoza**  
**JUDGE**  
**30/06/2021**

**Court:** Ruling delivered in the presence of Mr. Thomas Brush Advocate for the applicant. The respondent's advocate is unable to joint to the virtual court. She joined and after we changed the link she was unable to join. Mr. Mofuga, the Judge's assistant present.



**J. R. Kahyoza**  
**JUDGE**  
**30/06/2021**