

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

AT DAR ES SALAAM

MISCELLANEOUS CIVIL APPLICATION NO.360 of 2020

RAMADHANI SELEMANI MBELAKO.....APPLICANT

VERSUS

FATUMA SHABANI LIAWA.....RESPONDENT

(From the decision of the District Court of Kilombero at Ifakara)

(Mashabala, Esq- SRM)

Dated 10th June 2019

in

Civil Appeal No.5 of 2019

RULING

3rd May & 22nd July 2021

Rwizile, J.

The applicant one Ramadhani Selemani Mbeleko filed this application by chamber summons supported with an affidavit. It is preferred under rule 3 of the Civil Procedure (Appeals in proceedings Originating in Primary Courts) Rules, GN No. 312 of 1964 and Section 25(1)(b) of the Magistrates' Court Act, [Cap 11 R.E 2019]. He is seeking for orders that;

- a) The honourable court may be pleased to extend time for the applicant to appeal out of time against Civil Appeal No. 5 of 2019 in the District Court of Kilombero at Ifakara decided on 20/6/2019*

arising from Probate Cause No. 22/2018 at Mkamba Primary Court in Kilombero.

b) Cost of Application

c) Any other order(s) and relief(s) the court may deem fit and just to grant

In the affidavit affirmed by the appellant, he averred that, the reason for this application to be granted is due to errors in the district court judgement. He averred that; the intended appeal has overwhelming chances of success. At the hearing appellant was represented by Maliondo Law Chambers. For the respondent was Mr. Bageni. The application was argued by a way of written submission.

Supporting the application, Mr Mshana learned advocate adopted the applicant's affidavit. He argued that, the reason for his delay, was a date appearing on an exchequer receipt. He said, he filed an appeal on 10th July, 2019 which he said, he was within time. But, according to him, it was unfortunate that an exchequer receipt was issued on 13th July 2019 which was Saturday. He therefore urged, for that reason he found himself late for one day. He asserted that, the appeal was dismissed for being time barred on 2nd July 2020.

It was argued further that, the reason for this application is for this court, to correct some errors found in the judgement of the district court. He stated that, the district court erred in deciding the appeal against the law. He also said, it was wrong to frame issues without addressing them. He asserted more that; the district court supported a decision of the trial court which based on fictitious complaints.

Lastly, he added that, the district court when deciding the appeal, failed to see malice, ill-motive, inconsiderate and capricious intent of the respondent. According to him, it is done with the aim of taking more than her share of the estate. He was passionate that, the district court when deciding the appeal, framed its own issues suo motto. He said, the said issues were determined by the court without affording the parties right to be heard. He added, the court abandoned issues which were raised by the applicant. According to him, the same amount to illegality. It was his opinion that illegality is a sufficient cause for this application to be granted. He relied on the cases of **The Principal Secretary Ministry of Defence and National Services vs Devram Valambia** [1991] TLR 387, **Yusuph Same and Another vs Hadija Yusuph**, Civil Appeal No. 1 of 2002, **Shanti Vs Hindoche** [1973] EA 2007 and **Felix Tumbo Kisima vs TTCL Limited and Another**, Civil Application No.1 of 1997.

His view was, the applicant will be extremely prejudiced and the estate of the late Rashid Seleman Mbelako will be diminished, wasted and lost if this appeal will not be revised. The learned advocate prayed for this application to be granted.

Contending the appeal, Mr Bageni argued that, the applicant was late to appeal due to negligence. He went on arguing that, it is a rule that, the court is moved by facts which are supported by evidence. He said, the applicant ought to have brought/attached the exchequer receipt for this court to verify what has alleged. According to him, the same are just mere words with no effect. His opinion was, the applicant did not show sufficient cause for his delay. He also said, even now it took him 10 days to file this application. He stated that, the same shows how slopy the applicant is. He relied on the case of **Lyamuya Construction Company Limited vs**

Board of Registered Trustees of Young Women's Christian Association of Tanzania, Civil Application No.2 Of 2010.

He argued more that, it is in his knowledge that illegality of a decision can be ground for extension of time. However, he said alleged illegality must be of sufficient importance. He added, it must be apparent on the face of record. He found his support in the case of **Ngao Godwin Losero vs Julius Mwarabu**, Civil Application No. 10 of 2015.

It was the advocate's assertion further that, the applicant's complaint on illegality is of no merit. He said, there was nothing wrong for the appellate court to raise its own issues out of grounds of appeal. He added that, the record shows at page 6 of the judgement, the district court raised two issues which were determined. The decision of the trial court, according to him was upheld, the alleged illegality stated is a mere speculation.

He asserted further that, even the intended appeal will be of no use. The respondent has already filed an inventory in court and no complaints from the beneficiaries on the same. He added that, the applicant is not a beneficiary to the estate unlike the respondent who was the deceased's wife.

He therefore prayed for this application to be dismissed with costs. When re-joining, the learned advocate reiterated what had submitted in chief.

Having considered the rival submission of the parties, the Magistrates court Act provides under section 25(1)(b) for 30 days to appeal against the decision of the district court when exercising its revisional or appellate jurisdiction. The section states that;

25.-(1) Save as hereinafter provided-

(a)

(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 there from to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired.

However, under section 14(1) of the Law of Limitation, **[Cap 89 R.E 2019]** extension can be granted upon showing sufficient cause. For ease reference the same states;

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.

It is trite that, granting or refusing extension of time is an absolute discretion of the court. Though, for the same to be granted, one must show sufficient cause and account for each day of delay. The same is stated in the case of **Benedict Mumello vs Bank of Tanzania**, Civil Application No. 12 of 2012, where the Court of Appeal of Tanzania held inter alia that:

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

I am also fortified by the case of **Wambura N. J Waryuba vs The Principal Secretary Ministry for Finance and Another**, Civil Application No.320/01 of 2020, when the Court of Appeal held that;

"...It is essential to reiterate here that the Court's power for extending time under Rule 10 of the Rules is both wide-ranging and discretionary but it is exercisable judiciously upon good cause being shown.

The question to be determined is whether the applicant has shown sufficient cause for delay. The same is answered by the principle stated in the case of **Lyamuya Construction Company Limited (supra)** and see also the case of **Wambura N. J Waryuba (supra)** at page 7. The Court of Appeal in Lyamuya held that;

- i. The delay should not be inordinate;*
- ii. The Applicant should show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take;*
- iii. If the Court feels that there are other sufficient reasons such as the existence of a point of law of sufficient importance, such as the illegality of the decision sought to be challenged*

Coming to this application at hand, the impugned decision was delivered on 10th June 2019. The applicant alleged that; he filed an appeal on 10th July 2019, however the same was paid for on 13th July 2019. He therefore was out of time for 3 days. The applicant faulted those who issued the receipt for writing a wrong date on the same. According to him, the assigned date was on Saturday.

For the same, I am in agreement with the learned advocate for the respondent, that the said complaint are mere words with no evidence. It is trite that he who alleges must prove, as per section 110 of the Evidence Act [Cap 6 R.E 2019]. It my considered view that, applicant ought to have attached the said receipt to support his argument. Moreover, I find so unfortunate that, the applicant did not say when did he pay for the same. It is from the fore going reason, I think his complaint is unjustifiable.

Another reason adduced by the applicant, is illegality on the judgement of the district court. He said, the fact that the district court raised its own issues suo motto without affording them (parties) right to be heard, amount to illegality. When I perused the impugned judgement at page 5 to 6, the district court raised two issues, for ease reference the same states;

In determining this case the court raised two issues; -

- i. Whether or not the appeal has merit?*
- ii. What legal redress to be taken?*

The question I asked myself is, are those issue prejudicial. My humble answer would be in the negative. Because, I firmly consider them to be in line with the grounds so raised. I am saying so because, it was elaborated by the Resident magistrate at page 6 of the judgement that;

"In answering the first issue this court considered only ground two and three, first one was dropped by appellant counsel forth ground was dropped by this court, the remaining ground of appeal centred on power of the court to renounce the co-administrator and when the court to do so...."

From the foregoing, it is apparent that the complaint by the applicant that the appellate court did not determine the grounds of appeal, is unjustifiable. It therefore cannot be said, the impugned decision is tainted with illegality. Even if we assume the said issues were illegal, the question would be, is that illegality of sufficient importance. The same is answered in the case of **Ngao Godwin Losero (supra)** when the Court of Appeal cited with approval the decision in the case of **Lyamuya Construction Company Limited (supra)** when it said, illegality must be of sufficient importance. They said, there must be those which are apparent on the face of the record and which cannot be discovered in a long-drawn argument or process. For ease reference, it was held at page 7-8 that;

*Incidentally, the Court in the case of **Lyamuya (supra)** made the following observations: -*

"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 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 emphasised 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."

Applying the foregoing statement of principle to the case at hand, I am not persuaded that the alleged illegality is clearly apparent on the face of the impugned decision. Certainly, it will take a long-drawn process to decipher from the impugned decision the alleged misdirection or non-directions on points of law.

It is from the foregoing, I hold that, the illegality complained by the applicant is not justified.

It is trite law that in considering whether or not to grant such extension of time, courts take into account these factors as shown above, the length of the delay, the reason for the delay if it was the delay caused or contributed by the dilatory conduct of the applicant as well as the degree of prejudice to the opposite party if the application is granted. It has been recalled that the applicant was late just for three days. I think, the delay was not inordinate and the reasons are apparent. Based on the above finding. I grant the application. The applicant is given only 14 days to file the desired appeal. No orders as to costs.

**AK. Rwizile
Judge
22.07. 2021**



Recoverable Signature

X

Signed by: A.K.RWIZILE