

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

MISCELLANEOUS CIVIL APPLICATION NO.447 of 2019

SELEMANI ABDUL HANYA..... APPLICANT

VERSUS

MUSTAPHA ISMAIL HANYA & 7 OTHERS.....RESPONDENT

(From the decision of the District Court of Kinondoni at Kinondoni)

(Mtarania, Esq- RM)

Dated 17th June 2014

in

Probate Appeal No.10 of 2013

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RULING

6th June & 9th August 2021

Rwizile, J.

The applicant has filed this application applying for extension of time within which to file an appeal out of time. The application as usually, supported by an affidavit of the applicant. She averred among other things that the delay was caused due to missing of the original record at the District Court of Kinondoni. Brief facts would show, facts leading to this application are centred in probate cause No. 10 of 2013. The decision was made on 17th December 2014. The applicant was dissatisfied by the decision of the trial court. But when applied for the judgement for appeal purposes it could not be availed in time. He applied for extension of time

before this court. The same was granted and given 14 days to appeal. he filed his appeal before trial court as it was directed but the file was missing. It could not be traced until 2017. He then appealed before this court but as it turned out, there were serious irregularities on the manner in which the same was admitted. Since he was given an extension of time on 12th May 2015, it was not expected to find the appeal being admitted on 13th October 2015. The court for that matter struck out the appeal on 17th August 2018. Later on, the appellant took the other chance to apply for extension of time. He has filed this application therefore under section 25(1)(b) the Magistrates' Court Act

The applicant is represented by Mr. Daud Mzeri learned advocate who upon failure of normal service on the respondents, a substitute service was done. It was done in the Mwananchi Newspaper dated 13th March 2021 at page 25 and the Uhuru Newspaper at page 20. This application therefore has been taken exparte and argued by way of written submissions.

Mr. Mzeri was of the submission that the application under section 25(1)(b) of the MCA, this court has discretion to enlarge time before or upon expiry of 30 days. He also supported this position with the case of **Abdul-Rahman Selemeen Islam vs Africariers Ltd**, Misc. Commercial Application No. 203 of 2018. According to his uncontroverted submission, the two years passed waiting for the record that was missing at the trial court. He therefore asked this court to find such delay as sufficient reason for delay. For him, this delay was caused by the trial court not the applicant. He found support in the case of **MS SKY Packaging (T) Ltd versus MS Bhanji Logistics Ltd**, Misc. Civil Application No. 33 of 2019.

All this taken in totality, he submitted, the applicant has employed enough effort and should be allowed to file his appeal as decided in the case of **Justian Novat vs Joas Byerwazo**, Civil Application No. 31 of 2019.

Having considered the submission of the applicant, I have to say at once that as submitted, 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 case of **Lyamuya Construction Co. Ltd vs Board of Trustees of Young Women's Christian Association of Tanzania**, Civil Application No 2 of 2010 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 affidavit supporting the application is clear and states the reasons for delay as shown hereunder right from para 2 to 8;

- 2. That, on 12th May, 2015 I filed application for extension of time within which to file an appeal. And the reason for that extension was that I failed to apply before because I was waiting for the copy of judgment.*
- 3. That, after applying that extension the case was assigned to Hon. E.M.Feleshi, J where we were summoned to appear before him on 17th June, 2015.*
- 4. That, after hearing us on 24th July, 2015 Hon. E.M. Feleshi, J granted the time of 14 days within which to file an appeal. The copy of the ruling is hereby attached as annexure **HN1** for it to form part of this affidavit.*
- 5. That, after being granted that leave to file the appeal, on 7th August, 2015 I filed the appeal at Kinondoni District*

*Court. The copy of the petition of appeal filed before Kinondoni District Court is also attached as annexure **HN 2** for it to form part of this affidavit.*

- 6. That, I made several follow up from High Court to see if the file has been transferred from Kinondoni District Court but I was told that the same has not been transferred there.*
- 7. That, after being told that, I returned to Kinondoni District Court to ask about that file but the file was missing until on 10th October, 2017 where **ESTHER NATHANIEL** who is the court clerk told me that the file has already being sent to the High Court.*
- 8. That, after the file being taken to High Court it was admitted on 13th October, 2017 and fixed for hearing before Judge A. Munisi where it was found that there are serious irregularities concerning that date of admission and the date when it was filed and therefore the Judge strike out the appeal. The copy the ruling is hereby attached as annexure **HN 3** for it form part of this affidavit.*

The point to consider is the applicant had successfully appealed before this court upon being given 14 days. This means, paragraphs one to 7 of the affidavit had been sufficiently applied by this court. but para 8 presents somewhat a different story. I am saying so because, the decision by Minisi J (as she then was) was delivered on 17th August 2018, as annexed as HN3. It made it clear that there were irregularities that would not sufficiently allow the court to take up an appeal. The court then decided to strike out the appeal. The rationale behind this decision, I think was to allow the applicant to have the same corrected and then an appeal

be reprocessed. Therefore, it was right for the applicant, as it may seem to file this application. but my worry is, upon perusal of the record, it is shown that this application was filed on 29th August 2019. To say the least, it then took the applicant another one full year to file this application. This time, period of one year is not referred anywhere in the affidavit and in the submissions. In my view, this period was crucial for him to account for. Since the passed time had been covered by filing an appeal itself. One might think that because there were grave errors on party of the trial court to have the file traced for nearly two years and for having made a bad endorsement on the record which is also reflected by the affidavit of the court clerk, then the applicant should be left without any query. Basing on the principles stated in the cases as shown above. The applicant ought to account for the period from 17th August 2018 to 29th August 2019.

I therefore consider this application shockingly out of time without sufficient reason for delay. It should therefore be dismissed as I hereby do. Since it was taken exparte. I make no order as to costs.

AK. Rwizile
Judge
09.08. 2021



Recoverable Signature

X

Signed by: A.K.RWIZILE