

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

AT DAR ES SALAAM

MISC. CIVIL APPLICATION NO. 96 OF 2021

(Arising from the decision, order and Proceedings in Probate and Administration Cause No. 40 of 2006 by Hon. H. Shaidi PRM, Resident Magistrate Court of Dar es salaam at Kisutu, Dar es salaam)

RICHARD SAMWEL MACHANGU APPLICANT

VERSUS

BETTY MACHANGU As Administratrix of the

estate of the late **SAMWEL MACHANGU.....1ST RESPONDENT**

WHITSUNM MUSHI As Administrator of the

estate of the late **SAMWEL MACHANGU2ND RESPONDENT**

RULING

29th July 2021 & 20th August, 2021.

E. E. KAKOLAKI J

Preferred under section 14(1) of the Law of Limitation Act, [Cap.89 R.E 2019] hereinto referred as LLA and Section 95 of the Civil Procedure Code, [Cap. 33 R.E 2019], by way of chamber summons supported by affidavit of the applicant one **Richard Samwel Machangu**, this Court is moved by the Applicant to extend time to him within which to file an application for revision

to this court against the decision, ruling, order and Proceedings of the Resident Magistrate Court of Dar es salaam at Kisutu in Probate and Administration Cause No. 40 of 2006, dated 30/11/2020 and further that costs of the application be provided for. The application which is supported by the 2nd respondent has met resistance of the 1st respondent who filed her counter affidavit for that purpose sworn by **Betty Machangu**.

Briefly the background story of the matter as discerned from the applicant's affidavit and 1st respondent's counter affidavit goes thus. The application originates from the order and Proceedings of the Resident Magistrate Court of Dar es salaam at Kisutu dated 30/11/2020 in Probate and Administration Cause No. 40 of 2006 that closed the probate matter which was pending before that court after filing of the inventory and final accounts of the estate by the 1st respondent. Prior to that way back 2007 the 1st and 2nd respondents were jointly and together appointed to administer the estate of the late Samwel Machangu who died intestate on 07/05/2006 at Masaki area within Kinondoni District in Dar es salaam region. The deceased was survived with a widow (1st respondent) and twelve (12) children, four (4) children begotten from the 1st respondent and eight (8) children including the applicant sired to different mothers from the 1st respondent. He also left behind estate worth approximately Tanzanian Shilling one billion (Tshs.1,000,000,000/=) that fell into administration of both respondents. As the respondents were still working in their office some misunderstanding developed between the applicant and 1st respondent as everyone is telling his/her own tale in the affidavits, the misunderstanding that culminated into filing of Misc. Civil Application No. 109 of 2018 by the applicant, seeking to revoke both respondents' letters of administration of the estate of the late

Samwel Machangu and their removal from the office for failure to exercise their duties. Upon hearing of the said application the trial court instead of revoking the appointment of both respondents as sought in the chamber summons, in its ruling handed down on 28/09/2020 appointed and added the applicant as the third (3rd) co-administrator with powers to inquire into matters subject of his complaints and take action in accordance with the law and procedure. After the applicant had started exercising his powers in the office as co-administrators on 28/11/2020 the 1st respondent suo motu filed the inventory and final accounts of the estate the result of which moved the trial court to closed the probate cause pending before it vide its order dated 30/11/2020.

On the 16/02/2021 through his advocate one Tazan Mwaiteleke, the applicant filed with the trial court an application seeking to restrain the 1st respondent from interfering with his powers as co-administrator of the estate and an order for his access to some of the estate including the property/plot where his father the late Samwel Machangu is laid to rest. Unfortunately the said application could not be admitted as he was informed the probate cause was already closed. On the same date of 16/02/2021 advocate Mwaiteleke vide his letter that was received in court on 17/02/2021 requested for perusal of the court record in order to establish what transpired in court on 30/11/2021 before he wrote another letter on 19/02/2021 to the same court received on 22/02/2021 requesting for certified court of the order and proceedings of the trial court dated 30/11/2020. The said copy of order and proceedings was supplied to him on 02/03/2021 hence this application filed on 03/03/2021.

Both parties in this matter are represented and the application was heard viva voce. The applicant engaged advocate Tazan Mwaiteleke to represent him whereas the 1st and 2nd respondents enjoyed the services of Mr. Novatus Muhangwa and Ms. Judith Ulomi respectively, both learned advocates. It is Mr. Mwaiteleke who took the floor first to address the court while adopting both applicant's counter affidavit and reply to counter affidavit to form part of his submission. Submitting in support of the application Mr. Mwaiteleke said the provisions of the law under which this court is moved to grant the application empowers it to so act. He informed the Court that, the applicant in this matter is seeking an extension of time to file an application for revision of the ruling or order and proceedings of the trial court in Probate and Administration Cause No. 40 of 2006 dated 30/11/2020. He argued the only issue for determination by this court is whether the applicant has disclosed sufficient reasons to warrant this court grant him extension of time as prayed. The answer to him is yes. He said so relying on a number of cases giving guidances on what to be followed by the court when determining whether sufficient reasons have been advanced or not by the applicant, one of which is to account for each day of delay caused by the applicant. He mentioned them as **National Housing Corporation Vs. Tahera Somji**, Civil Application No. 344/17 of 2018 (CAT-unreported) when cited 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(CAT-unreported) and **Mashaka Juma Shaban and 42 Others Vs. The Attorney General**, Civil Application No. 279/01 of 2016 (CAT-unreported) when cited the case of **Julius Francis Kessy and 2 Others Vs. Tanzania Commissioner for Science and Technology**,

Civil Application No. 59/17 of 2018 (CAT-unreported). Accounting for the delayed days by the applicant, Mr. Mwaiteleke submitted, since his appointment as co-administrator on 28/09/2020 the applicant remained unaware of the closure of the Probate Cause which was pending in trial court until 16/02/2021, when an application to restrain the 1st respondent from interfering him in the office as administrator was filed in court only to learn that it could not be admitted as the Probate Cause No. 40 of 2006 was already closed upon the 1st respondent filing of inventory and final accounts. He said vide his letter dated 16/02/2021 filed in court on 17/02/2021, applicant's advocate requested to peruse the case file and later on applied for certified copy of the impugned order/ruling vide his letter dated 19/02/2021 which was received in court on 22/02/2021. The said copy of court's order was collected on 02/03/2021 and this application filed on 03/03/2021, thus the applicant has accounted for each and every day of his delay, Mr. Mwaiteleke submitted.

That aside, the other good cause for extension of time Mr. Mwaiteleke mentioned is the illegality of the decision or order sought to be challenged as stated in paragraph 23 of the applicant's affidavit. He said illegality in the said order is traced from the following:

- (a) The trial court's act of closing the case file which act renders nugatory its order in Misc. Civil Application No. 109 of 2018 that appointed the applicant as co-administrator with view of dealing with complaints in management of the estate.
- (b) That court act of closing the case file denied the applicant of his right to be heard and challenge the inventory filed by the 1st

respondent and administration of the deceased estate by the 1st respondent.

- (c) His appointment as co-administrator of the estate without so applying is problematic and contrary to the law.
- (d) That his co-administration of estate with the 1st respondent has been problematic to him since his appointment has been a source of so many problems to him.
- (e) Court's order of his appointment as co-administrator closely followed by the closure order of the case file are incompatible orders as they bring confusion in the administration of estate.
- (f) That the Resident Magistrate Court of Dar es salaam at Kisutu had no jurisdiction to deal with the matter in dispute as its value went far beyond its pecuniary jurisdiction for worth Tshs. 1,000,000,000/=.

According to Mr. Mwaiteleke illegality if established alone is sufficient cause to warrant this court grant extension of time as held in several decisions including **Victoria Real Estate Development Ltd Vs. Tanzania Investment Bank and 3 Other**, Civil Application No. 225 of 2014(CAT-unreported), **The Principal Secretary, Ministry of Defence and National Services Vs. Devram Valambhia** (1992) TLR 182 and **Amour Habib Salum Vs. Hussein Bafagi**, Civil Application No. 52 of 2009 (CAT-unreported). That said, he argued the applicant's delay was not resulted from negligence as the applicant was not made aware of the decision before it was pronounced, so to deny him with extension of time, will stand him in a losing side as the 1st respondent will gain unfair shares of estate over other heirs since the un-procedurally filed inventory and accounts will not be questioned. He therefore implored the court to grant the application.

Mr. Muhangwa for the 1st respondent while praying to adopt 1st respondent's counter affidavit resisted the application submitting that, the same suffers serious deficiency of merits. He however admitted the cases cited by the applicant are providing guidance to the court particularly on matters to be considered when granting application of this nature though he added the case of **Lyamuya Construction** (supra) is very relevant also to the scenario of our case. According to him the question to be answered by this court is whether the applicant has met the conditions stipulated in **Lyamuya Construction's** case. Responding to the question he said, the applicant has demonstrated one of the reasons for the delay to be lack of awareness of existence of the court's order closing the case which he alleges to become aware of on 16/02/2021 when attempting to file the application restraining the 1st respondent from disturbing him in the office. He said, the applicant however has failed to account for 20 days from 16/02/2021 the date when he became aware of the order closing the file until when this application was filed in this court on 03/03/2021, as he has to account for each any every day of delay as per the requirement of the law as stated in the case of **National Housing Corporation** (supra). That, the applicant did not state when he received the copy of order/proceedings sought to be impugned, hence failure to account for the days delayed. On the issue of illegality of the decision/order sought to be challenged he argued, the applicant has failed to point out the alleged illegalities. On the allegation that the applicant was given six (6) months after his appointment as co-administrator to file the report he said, the ruling does not state so. As to the assertion that the 1st respondent filed false inventory and accounts of estate, and that parties were not summoned to verify them thus the omission constitutes illegality,

he argued the allegation of fraud cannot be challenged in this matter but rather through criminal proceedings should the applicant wish to so pursue. Further to that he submitted, once inventory and final accounts are filed in court then probate cause is closed from that day as it was held in the case of **Ahmed Mohamed Al Laamar Vs. Fatuma Bakari and Another**, Civil Application No. 71 of 2012 (CAT-unreported). He added there is no requirement of the law for the court to summon the parties when closing the probate file as it was held in the case of **Joseph Shumbusho Vs. Mary Grace Tigerwa and 2 Others**, Civil Appeal No. 183 of 2016 (CAT-unreported). With regard to the raised issue of jurisdiction he countered the same was discussed and determined by this Court in Civil Appeal No. 07 of 2019 (HC-unreported), where the court said, the trial court had jurisdiction to entertain the matter. In view of the above submission Mr. Muhangwa submitted, the application is devoid of merits and deserves to be dismissed as every case must come to an end as it was observed by the Court of Appeal in the case of **Salim Mohamed Marea @ Komba Vs. The Republic**, Criminal Application No. 01 of 2020 (CAT-unreported). He therefore implored the court to dismiss the application with costs.

In his reply submission Ms. Ulomi for the 2nd respondent while adopting the 2nd respondent's counter affidavit informed the court that, the 2nd respondent is not contesting the applicant's application and the prayers thereto. She therefore invited the court to grant the application.

In his rejoinder submission Mr. Mwaiteleke on the issue of jurisdiction of the trial court to try probate matter he stated, what was determined by this court is concerning the general jurisdiction of the trial court and not pecuniary

jurisdiction which the applicant seeks to question during the revision should this application be successful. As regard to contention of failure of the applicant to state when the copy of the order sought to be impugned was collected from the trial court he argued the same was stated during submission in chief that, it was obtained on 02/03/2021 and this application filed on 03/03/2021. With regard to the issue of questioning the trial court's act of closure of the case after filing of inventory and accounts he said, the cited cases by the 1st respondent's counsel are distinguishable as in this matter the case was closed without knowledge of other two co-administrators unlike in the cited cases where the administrator was only one. And lastly on the absence of legal requirement to summon parties during closure of probate matter he said, that is a matter of practice and prudence in order to avoid further conflicts of parties after closure of probate cause. Otherwise Mr. Mwaiteleke reiterated his submission in chief and pressed this court to grant the application.

I have dispassionately considered the fighting arguments as well as perusing the pleadings filed by both parties in support and against this application. What is gathered from them is that both are at one on the fact that this court has discretionary powers to grant the applicant's sought prayers upon good cause or sufficient reasons established. What amounts to good cause there is no hard and fast rules as it depends on the circumstances of each case and the material advanced by the applicant to move the court to grant the application. See the case of **Osward Masatu Mwizarubi Vs. Tanzania Fish Processing Ltd**, Civil Application No. 13 of 2010, (CAT-unreported). It is true as submitted by Mr. Muhangwa that the Court of Appeal in the case of **Lyamuya Construction Company Ltd Vs. Board of Registered**

Trustees of Yong Women's Christian Association of Tanzania, Civil Application No. 2 of 2010 (CAT-unreported) listed a number of factors to be considered by the court when exercising its discretion whether to grant the application or not. The list is not exhaustive as it was extended in the case of **Julius Francis Kessy and 2 Others** (supra) to include the following factors:

- 1) The length of delay,*
- 2) The reason for delay,*
- 3) The applicant must account for the delay of each day;*
- 4) Degree of prejudice that the respondent may suffer if the application is granted.*
- 5) The delay is not inordinate.*
- 6) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*
- 7) 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.*

Applying the above cited factors to the present case it is not disputed by both parties that when the probate case file was closed on 30/11/2021 in the absence of parties and therefore the applicant was not made aware until 16/02/2021 when admission of his application to restrain the 1st respondent from interfering him as a co-administrator was rejected on the reason that the probate case file was already closed. Mr. Muhangwa's contention that there is delay of 20 days unaccounted for from 16/02/2021 to the date of

filing this application on 03/03/2021 in my considered view lacks factual evidence as the applicant accounted for those days which in the first place are not 20 but rather 15 days. In paragraph 19 of his affidavit the applicant stated on how his advocate one Mwaiteleke wrote a letter annexure RSM-9 to the court requesting for perusal of the trial court's record after rejection of the admission of the said application. The said letter was received in court on 17/02/2021. And that after perusal as per paragraph 45 of his reply to counter affidavit on 19/02/2021 wrote a letter which was received in court on 22/02/2021 requesting for copy of the order of 30/11/2020, which order was supplied to him on 02/03/2021 as per the certification stamp, before this application was filed on 03/03/2021. With all that evidence this court is satisfied that, the applicant has managed to supply material evidence to justify his delay in filing this application as well as the intended application for revision since no single day has left without being accounted for. The reasons for the delay as advanced has left me without doubt that the applicant acted diligently in pursuing his matter and there was no sign of apathy or negligence on his part. I have also taken into consideration the fact that the delay was not inordinate and that the degree of prejudice to respondent is minimal as compared to the one that would be caused to the applicant should grant of this application be rejected.

With those sufficient reasons advanced by the applicant I would have stopped here and proceed to grant the applicant but given the issue of illegality of the decision or order as raised by the applicant I find it apposite to go extra mile to consider the same. As alluded to herein above the applicant raised several points to establish illegality of the trial court's decision. My duty here is not to determine whether the decision is illegal or

not but rather to be satisfied that the issue raises a point of law of sufficient importance worth of determination by this court as it was held in the case of **Lyamuya Construction** where the Court of Appeal said:

If the court feels that, there are other reasons, such as the existence of a point of law of sufficient importance, such as illegality of the decision sought to be challenged.

In this case the applicant raised the issue of the jurisdiction of the trial court to entertain the probate matter with estate value far beyond its pecuniary jurisdiction in which Mr. Muhangwa submitted the same was discussed and determined by this Court in Civil Appeal No. 07 of 2019 (HC-unreported), where the court said, the trial court had jurisdiction to entertain the matter. Having taken judicial notice of the said decision I agree with Mr. Muhangwa that the issue as to whether the trial court had jurisdiction or not was determined by this court in that decision and therefore cannot form part of illegality of the decision sought to be challenged. If the applicant was aggrieved with that decision he should have challenged it by way of appeal to the Court of Appeal and not to this court by way of application for revision as that did not form part of the order or proceedings sought to be challenged. Even if it is raised in the revision application this court will be functus officio to entertain and determine it.

As regard to the complaint of applicant being appointed as co-administrator without applying I do not find merit on it. I agree with Mr. Muhangwa's submission that if the applicant was aggrieved with the said decision ought to have appealed against it in which he failed to do. He cannot be heard at this stage therefore complaining or raising the issue as a point of illegality.

On the complaint of closure of probate cause soon after filing of inventory and final accounts of the estate without summoning the parties, I agree with the position of the law as submitted on by Mr. Muhangwa that once the inventory and accounts are filed the probate matter is closed and that there is no legal requirement to summons parties before its closure as held in the cases of **Ahmed Mohamed Al Laamar** (supra) and **Joseph Shumbusho** (supra). However as rightly submitted by Mr. Mwaiteleke for the applicant the said position of the law is inapplicable in the circumstances of this case where the administrators of estate are more than one unlike the situation in those two cases. In this case the legal point is whether a co-administrator can prepare and file inventory and accounts of estate in exclusion and without knowledge of the other co-administrator. In my opinion this is a point of law of sufficient importance to be addressed and determined by this court, the point which takes me to the conclusion that the applicant has managed to establish to the satisfaction of this court that a point of illegality is existing in the decision/order sought to be impugned.

Having so found it is my considered view that, the applicant has managed to advance good cause to warrant extension of time for him to file the application for revision of the decision/order of the Resident Magistrate Court of Dar es salaam at Kisutu date 30/11/2020. For those reasons, the application is therefore granted. Time is extended to the applicant for a period of fourteen (14) days from the date of this ruling to file to this court an application for Revision. Costs to be in the course.

It is so ordered.

DATED at DAR ES SALAAM this 20th day of August, 2021.



E. E. KAKOLAKI

JUDGE

20/08/2021

Delivered at Dar es Salaam in chambers this 20th day of August, 2021 in the presence of Mr. Andrew Francis advocate for the Applicant, Mr. Novatus Muhangwa advocate for the 1st Respondent, Ms. Judith Ulomi advocate for the 2nd Respondent and Ms. Asha Livanga, court clerk.

Right of appeal explained.



E. E. Kakolaki

JUDGE

20/08/2021