

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**MUSOMA – SUB REGISTRY**

**AT MUSOMA**

**MISC. CIVIL APPLICATION NO 39 OF 2021**

*(Arising from PC Probate Appeal No. 5 of 2020, in the High Court of Tanzania at Musoma)*

**GABRIEL JOSEPH (Administrator of the estates of the late JOSEPH CHACHA MUKOHI) .....APPLICANT**

***VERSUS***

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

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

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

**RULING**

9<sup>th</sup>September&15<sup>th</sup>October 2021

**F. H. MAHIMBALI, J.:**

The applicant Gabriel Joseph (Administrator of the estates of the late Joseph Chacha Mukohi), is seeking for an extension of time within which to file an application for a certification on point of law to Court of Appeal of Tanzania against the judgment of this Court (Hon Justice Kahyoza) in PC Probate Appeal no. 5 of 2020. The application is supported by an affidavit of the applicant.

In the said PC Probate Appeal no. 5 of 2020, the High Court on 24<sup>th</sup> September, 2020 invoking the revisionary powers under section 44 of the MCA, declared all acts done by the administrator as a nullity. Consequently, the records of the primary court in Pingamizi la Mirathi No. 3/2018 and the district court records emanating therefrom were quashed and set aside. The applicant herein being the appellant therein, was disqualified to administer the deceased's estate for his failure or delay to exhibit an inventory of all estates and liabilities and for failure to file a statement of final account in form V and form VI respectively pursuant to rule 10 of G.N. 49 of 1971 of the Primary Courts (Administration of Estates) Rules.

As he delayed to take the appropriate legal cause against the decision of this court following its verdict in the said PC Probate Appeal no. 5 of 2020, the applicant herein filed Miscellaneous Civil Application No. 11 of 2021 seeking an extension of time to file Notice of Appeal to High Court, the same was granted on 30<sup>th</sup> June, 2021.

Following this court's ruling in Miscellaneous Civil Application No. 11 of 2021 granting an extension of time to file Notice of Appeal to Court of Appeal, the applicant then on 14<sup>th</sup> July 2021 after he had filed his Notice of Appeal on 9<sup>th</sup> July, 2021 pursuant to Court's order dated

30<sup>th</sup> June, 2021, filed this current application seeking extension of time to file an application for certification on point of law to Court of Appeal.

As to why he has filed this application now, the applicant via his affidavit in paragraphs nine to twelve depones that he was first required to obtain leave of the High Court to file Notice of Appeal out of time. Upon being granted, he filed the same and then filed this application as it is a mandatory legal requirement to have a certification on point of law before knocking doors of the Court of Appeal as per law for such matters emanating from courts subordinate to High Court.

Apart from accounting the reasons for his delay of filing the said application timely, the applicant in paragraph 13 of his affidavit, depones that there are illegalities by the High Court's verdict in PC Probate Appeal No. 5 of 2020 worthy determinable by the Court of Appeal:

*Firstly*, the High Court assumed the powers of nullifying the appointment of administrators and thus appointing its own administrators

*Secondly*, the order of the High Court nullifying all activities performed by the applicant is irregular and in violation of the law.

*Thirdly*, the decision of the High Court has adverse effects to other persons not parties to the proceedings thus, violates their rights.

*Fourthly*, following the High Court's verdict, the parties were not afforded the right of being heard in the District Court and this honourable court is seized with further powers of determining the rest of the grounds of appeal.

The application is opposed by the respondents for lacking sufficient reasons of granting extension of time on reason of failure to account for each day of delay. Furthermore, as regards the illegalities pointed out have been rebutted qualifying the attention of the Court of Appeal as the position of the law is settled on them.

During the hearing of the application on line, the applicant was represented by Mr. Brash learned advocate whereas the respondents were enjoying the legal services of Miss Happiness Robert learned advocate.

In support of the application, Mr. Brash learned advocate prayed the applicant's affidavit be adopted as part of the applicant's submission and added on the pointed-out illegalities the attention of the Court of Appeal is necessary. Citing the cases **of Finca Tanzania Ltd and**

**Another V. Boniface Mwalukisa, Civil Application no. 589/11/2018, Juto Ally V. Lucas Komba & AlloyceMusafiriMusika, Civil Application no. 484/17/2019, Court of Appeal and Gabriel Joseph V. Ambrose Gwasi Mwikhoi and 2 Others**, that where there is an illegality, it is sufficient cause to grant extension of time. In the light of the above, Mr. Brash learned counsel is of the humble view that this application be allowed.

Opposing the application, Miss Happiness Robert for the respondents submitted strongly that there are no good stated reasons in accounting the delayed days pursuant to this application. The fact that the applicant is a retiree and thus having no sufficient means to meet costs in pursuing the application, it has been rebutted that this fact needs proof. It wanting proof, it cannot be taken as a sound reason. This is because, not every retiree is having no sufficient means to handle his financial needs. Under section 110(1) of the Tanzania Evidence Act, it is clear that he who alleges, must prove. In the absence of good and sufficient cause on accounting for each day of delay, the application for an extension of time is not maintainable. In support of this legal stand, the learned counsel cited the following cases:**Zaidi Jumanne Zaidi (the Administrator of the late Jumanne Zaidi) V.**

**RajabuAbdalah Mbano, Misc. Land Application no. 70 of 2020 – HC Kigoma, Bruno Wenceslaus Nyalifa V. Permanent Secretary Ministry of Home Affairs, Civil Appeal no. 82 of 2017, CAT at Arusha, Lyamuya Construction Company Ltd V. Board of Registered Trustees of Young Women of Association of Tanzania, Civil Application no. 2 of 2020, Ngao Edwin Loseo V. Julius Mwarabu, Civil Application no. 10 of 2015,** that in determining an application for an extension of time the following legal principles or guidelines are important:

- a) Account for each day of delay
- b) Delay not to be inordinate
- c) Diligence and not apathy, negligence or slowness
- d) If there are other factors or important reasons such as illegality.

It is her submission that, in the current application the applicant has not bothered to account for each day of delay instead has directed his mind only on a point of illegality. This is in consonant with the paragraph nine of the applicant's affidavit. Nevertheless, a mere mentioning of the said illegality is not sufficient. There must be explanation on the alleged illegality as it is not the law that every alleged

illegality will necessarily grant an application of extension of time. The point of law must be so significant to warrant the attention of the Court of Appeal (Mwanza RTC Trading Co. Ltd V. Export Trading Co. Ltd, Civil Application no. 12 of 2015, CAT at Mwanza and Tanzania Cigarette Company Ltd Vs. Hassan Mrua, Civil Application no. 49/01/2018, CAT at Dsm).

She concluded her submission by submitting that, those persons affected by the Court's decision in its adjudication duties, can have an appropriate legal cause against it as per law. Unless the learned counsel or the applicant is the agent of those other people, the alleged illegality not affecting the applicant cannot be a good ground for illegality to be brought to the attention of the Court of Appeal. With this, she concluded by urging the court to dismiss the application with costs for want of merit.

In his rejoinder submission, Mr. Brash learned counsel reiterated his submission in chief and added further that as per respondents' submission what is contested is found on grounds stated in paras 9 and 13 only, the rest (1-8, 10,11 and 12) are not contested. With the submission under para 13 of the applicant's affidavit which contains illegalities, the same have been exhaustively explained. In consideration



of the case of **Juto Ally** (supra) which is the most recent, elaborates the issue of illegality. A mere allegation of illegality is a sufficient cause or reason to grant an application for extension of time. It is not the duty of this court to weigh the same but rather it is the duty of the Court of Appeal to determine it. Considering the fact that the applicant being administrator of the deceased's estate had discharged several duties pertaining the said administration of the deceased's estate, nullification of all the tasks performed by the applicant subsequent to his revocation by the High court may cause embarrassment to other beneficiaries. Lastly, as this Court already granted filing the Notice of Appeal to Court of Appeal out of time, that grant would be nugatory if this application is not going to be granted. He humbly prayed the grant of this application with costs.

Having heard the submission of both parties' counsel for and against this application, the issue for determination by this court now is whether this application is meritorious to grant. Guided by the minimal guidelines set by the court of Appeal in the case of **Ngao Godwin Losero** (supra) making reference to the case of **Lyamuya Construction Company Ltd Vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania** (*Civil*



Application No. 2/2010 – unreported) the Court of Appeal reiterated the following guidelines for the grant of extension of time.

- a) The applicant must account for all the period of delay.*
- b) The delay should not be inordinate.*
- c) The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he is intending to take.*
- d) If the court feels that there are other sufficient reasons such as existence of a point of law of sufficient importance; such as the illegality of the decisions ought to be challenged.*

In reaching court's verdict, I have dispassionately considered and weighed the rival arguments from both parties through their respective counsel. For sure I am mindful that to refuse or grant this application is the court's discretion. However, to do so there must accounted reasons for that. In Mbogo Vs. Shah (1968) EA the defunct Court of Appeal for Eastern Africa held:

*"All relevant factors must be taken into account in deciding how to exercise the discretion to extend time....."*

One of the reasons deponed by the applicant is that there is an illegality. The law is settled that illegality in itself is a sufficient ground for extension of time. This was held in the case of Principal **Secretary,**

## **Ministry of Defence and National Service v. DevramValambhia**

(1992) TLR 182, where the Court of Appeal stated: -

*"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 there cord straight."*

Also, in the case of **MOHAMED SALUM NAHDI VS ELIZABETH JEREMIAH**, Civil Reference No. 14 of 2017 at page 7

*"We say so because the law is fairly settled that in applications of this nature, once an issue of illegality in the decision is sought to be challenged is raised, that amounts to good cause and the court, even if every day of delay is not accounted for, would grant extension sought so as to rectify the illegality on appeal..."*

With the current application, I am satisfied by the applicant's submission that there is an illegality pointed out which in law is a sufficient reason /cause to grant this application for extension of time. Whether the said illegalities pointed out are worth determinable by the Court of Appeal, will be considerably deliberated in the subsequent application after the grant of this. At this juncture, it is sufficient to hold

that as per submission by Mr. Brash learned counsel for the applicant, he has been able to tell the Court the genesis of this application and the reasons why this application is filed in Court now after being granted an extension of time to file Notice of Appeal to Court of Appeal. In his submission not only has he accounted the delayed days, but has also been able to point out the illegalities to be determined by the Court of Appeal. Prudence dictates the grant of this application as per submission done as opposed to its refusal. The same having met the legal threshold for its grant, the application is meritorious. However, each party shall bear its own costs as I see no good reasons why costs should be awarded in the circumstances of this application where it involves the family members and has a financial consequence in the administration of the estate itself.

It is so ordered.

DATED at MUSOMA this 15<sup>th</sup> day of October, 2021.



F. H. Mahimbali

JUDGE

15/10/2021

**Court:** Ruling delivered this 15<sup>th</sup> day of October, 2021 in the presence of the Mr. Brash, advocate for the Appellant and Happiness, advocate for the Respondent and Neema Likuga – RMA.

Right of appeal is explained.



F. H. Mahimbali

JUDGE

15/10/2021