IN THE HIGH COURT OF TANZANIA

(MTWARA DISTRICT REGISTRY)

AT MTWARA

MISC. CIVIL APPLICATION NO. 15 OF 2021

(Originating from Misc. Civil Application No.3 of 2020 from the District Court of Mtwara at Mtwara)

PAUL CHARLES MHERE.....APPLICANT

VERSUS

FELISTAS JAMES MWINGWA.....RESPONDENT

RULING

2nd Nov. & 7th Dec., 2021

DYANSOBERA, J.

Paul Charles Mhere, the applicant has, by a Chamber Summons taken out under section 14 (1) and (2) of the Law of Limitation Act, [Cap. 89 R.E. 2019] and any other enabling provisions of the law, moved this court to grant extension of time to appeal to this court against the decision of the District Court in Misc. Civil Application No.3 of 2020 (Hon. L.R. Kasebele-PRM) delivered on 18th day of September, 2020. The application is supported by an affidavit sworn by the applicant. However, the application has been opposed through a counter affidavit sworn by Rose Reginald Ndemeleje, the learned Advocate for the respondent.

When the application was placed before me for hearing on 02.11.2021 the applicant was represented by Ms. Anisa Mziray, the learned Advocate and at the same time, Mr. Mtembwa, the learned Counsel appeared for the respondent. The hearing was through oral submission or viva voce.

Arguing in support of the application, Ms Mziray submitted that she is aware that such application is only granted where good or sufficient cause is shown which depends on the facts of each case because there might be various reasons. Reference was made to the case of **Laurence Simon Asenga v. Joseph Magoso and 2 Others**, Civil Application No. 50 of 2016 CAT – Dar at p.3 to support her argument.

On the merits of the application, Ms Mziray argued that the applicant has sufficient reasons. First, that the impugned ruling was delivered on 18.9.2020 and the appeal from the District Court to High Court is ninety (90) days from the date of the decision as per the Schedule to the Law of Limitation Act. She further argued that after the decision, the applicant appealed to this court in time (i.e. within 50 days) vide Probate Appeal No. 36 of 2020 which was filed on 15.11.2020. After its successful registration, the said appeal encountered a preliminary objection from the respondent that the appeal was incompetent. On 27.4.2021 the preliminary objection which was before Ngwembe, J and was sustained and the Probate Appeal No. 36 of 2020 was struck out for being incompetent. Ms Mziray held the view that from 15.11.2020 when the appeal was filed to 27.4.2021 the applicant was prosecuting his appeal, the time should be excluded. She referred this court to s. 21 (2) of the Law of Limitation Act contending that where a case is before the court the time for prosecution is excluded and, therefore, that since such exclusion cannot be automatic, that is why they have come to this court on this application.

Ms Mziray, in further elaboration, submitted that after that first appeal was struck out the applicant made a follow up of drawn order and after obtaining it, he filed this application on 7.5.2021 stressing that in between they were waiting for the drawn order which was served to them in time. She emphasised that in that spirit S. 19 (2) of Law Limitation Act carries them as such time waiting for the supply of the decree or drawn order should be excluded. To buttress her argument, she referred this court to the case of **Mansoor Daya Chemicals Ltd.** According to her, the criteria to be considered on the grant of extension of time are length of delay, reason for the delay and the presence of an arguable case.

In response, Mr. Mtembwa prayed their counter affidavit filed on 8.7.2021 to be adopted as part of their submission and pressing that paragraphs 4, 6 7 and 8 have raised two issues. One, the decision of the District Court against revocation that is Misc. Application No. 3 of 2020 has not been appealed against. Two, the applicant has failed to show the efforts he took to obtain the document. It was his argument that the Probate No. 2 of 2019 was determined on 21.2.2020 in which the respondent was appointed to administer the estate of Robert Charles Ntaro and it is the decision which was appealed against in Misc. Application No. 3 of 2020 on revocation. He also submitted that after the revocation Felister James Mwinga as administrator has not been brought in court. In view of that he argued that Probate Appeal No. 36 of 2020 the subject of the appeal before Hon. Ngwembe, J was between Paul Charles Muhere v. Felistas James Mwingwa in her personal capacity not as administratix. Thus Mr. Mtembwa raised an issue that whether Felistas James Mwingwa and Felistas James Mwingwa was administratrix of deceased estate. In his view, these are two different personalities and the court should see that the appeal is different from the one being sought to be appealed against since they have two different

legal capacities. To fortify his argument, he referred this court to the case of **Salehe bin Kombo v. Administrator General** E. A P. 197 where the same office was sued in different capacities and it was held that the Administrator General was the same person but was litigating under different capacities. Mr. Mtembwa insisted that the issue is whether the two are the same in law. In cementing this issue, he made reference to the case of **Mark Inson v. Lackban** 1939 Vol 1 A11 E.R P 273 which talks about two separate distinct persons litigating under the same capacity. He was of the view that Probate Appeal No. 36 of 2020 which was dismissed on technicality was brought against Felistas James Mwingwa in her personal capacity and not in official capacity and, therefore, she cannot be heard to have been pursuing the case. It was his further argument that there is no dispute that Probate No. 2 of 2019 gave the respondent a different title as the administratrix of the deceased's estate. It was argued on part of the respondent that this application is misconceived. He conceded to the cited authorities but argued that the respondent is not same as was at the trial. He also maintained that tilting of the case is not cosmetic rather it goes to the root.

Arguing on the second point, which is whether the applicant used any effort to apply for such documents, Mr. Mtembwa submitted that there is no evidence that the applicant ever applied for a drawn order. He contended that the section does not apply when there is no proof that there was an application for the supply.

Respecting whether the trial Magistrate had jurisdiction, it was contended on part of the respondent that that ground is not reflected in the affidavit of the applicant, rather, it is a statement from the bar which is neither in the chamber summons nor the affidavit.

Mr. Mtembwa finally argued that this court is still uncertain if there or there is a drawn order. He urged this court not to grant the relief sought as there is no rationale of granting it.

In a rejoinder, Ms Mziray submitted that her fellow advocate has misdirected himself since Misc. No. 3 of 2020 was appealed against. She contended that the issue of probate started at Hon. Isanju as an Application No. 2 of 2019 as a probate matter. From Hon. Isanju the applicant applied revocation in the same court whereby the mode and method of revocation is governed by prescribed forms. Further that Misc. Civil Application No. 3 of 2002 was between Paul Charles as applicant against Felistas Mwingwa as respondent and the ruling is clear. She submitted that the way revocation was granted was between the persons in the same capacity as stated by the court and the Probate Appeal No. 36 of 2020 was between the same parties. She refuted the argument that there was a change of the capacity of parties during the appeal. She insisted that there is no proceeding that shows the respondent was administratrix and that the Appeal No. 36 of 2020 was in respect of Misc. Civil Application No. 3 of 2020 and not otherwise. As to the argument that the appeal would frustrate the entire proceedings, Ms Mziray submitted that it is not the function of the present exercise and the respondent should wait until the appeal is filed then he can advance that argument.

As to the drawn order, the learned advocate for the applicant made reference to paragraph 8 of the applicant's affidavit which is clear that the drawn order was not in court's record and that in the chamber summons it had been expressed that other grounds could be raised at the hearing of this application. She was of the view that she was not bound by the affidavit on the grounds she was to adduce. A further argument was made that even if the court decides that the time from when the decision was given to when they were following up the

copy of decree is not considered, still the applicant is within sixty two days and it will be within 90 days' notice. She reiterated what she submitted in Chief and prayed this court to grant extension of time to file the appeal.

I have gone through the record of this application and submissions from both parties thereof. From the outset I would say that I will not dwell on the first issue brought by Mr. Mtembwa in his submission since it was brought prematurely. Therefore, my endeavours will be on the reasons for the delay as advanced by the applicant to file his appeal on time before this court and the arguments in opposition.

I have dispassionately considered the reasons for the delay brought to the fore by the applicant. There is no dispute that the applicant timely filed his appeal to this court but the same was struck for want of some relevant document which ought to have been attached to the appeal record. It is the law in this jurisdiction that in order for an applicant to succeed to move the court exercise its discretion under section 14 of the Law of Limitation Act to enlarge time in applications of this nature, he must bring to the fore good and sufficient cause for the delay - see: **Kalunga and Company Advocates v. National Bank of Commerce** [2006] TLR.

I would deliberately say that todate no law or set of Rules in our jurisdiction that have attempted to define what it entails good cause. However, case laws in applications for extension of time have set some guidelines subject to the court's discretion and the circumstances of a particular case. For instance, the Court of Appeal in the case of **Regional Manager, TANROADS Kagera v. Ruaha Concrete Company Limited, Civil Application No. 96 of 2007** (unreported). 235 observed as follows: -

In the present case, without endeavouring much it goes without any resistance from this court that the applicant has explained away the delay up to the moment the Probate Appeal No.36 of 2020 was struck out for being incompetent on 27.04.2021 which the case laws describe it as an excusable technical delay.

For instance, in **Salvand K. A. Rwegasira v. China Henan International Group Co. Ltd.**, Civil Reference No. 18 of 2006(unreported) the Court of Appeal held:

> "A distinction had to be drawn between cases involving real or actual delays and those such as the present one which clearly only involved technical delays in the sense that the original appeal was lodged in time but had been found to be incompetent for one or another reason and a fresh appeal had to be instituted. In the present case the applicant had acted immediately after the pronouncement of the ruling of the Court striking out the first appeal. In these circumstances an extension of time ought to be granted"

Now, from the above legal position it is apparent clear that the applicant's delay is from the date 27.04.2021 when his appeal was struck out. Unfortunately, the applicant has not explained away the period of delay falling between 27.04.2021 when his appeal was struck out by this court and 7.5.2021 when he presented and lodged this application. That is about eleven (11) days not accounted for. In the affidavit supporting the application, it is deposed at paragraph 8 that "That the applicant's failure to appeal within the prescribed time of 45 days set by the law was due to the reason that during such long time, he was prosecuting his appeal before this honourable court which was finally thrown away for been incompetent. The fact which was not caused by applicant's default rather there was no certified copy of a so called drawn order

which was prepared by the district court to support applicant's appeal". Indeed, there is no explanation deposed in the affidavit as why it took about eleven (11) days to lodge the instant application since the applicant was aware from the very beginning as justified by paragraphs 5 and 6 of his affidavit that a preliminary objection on point of law was raised by the respondent.

In addition, the applicant knew that there was no certified drawn order on his hand. My observation on this argument is that, the applicant ought to file this application immediately after the ruling since attachment of the drawn order is a mandatory requirement of law. Therefore, from when the Preliminary Objection was raised the applicant ought to foresee the results of the Preliminary Objection raised by the respondent. Since he has filed this application after the elapse of eleven days then, he cannot benefit on a technical delay which I have already alluded earlier.

Furthermore, mere words that after Probate Appeal No.36 of 2020 was struck out by this court and then making follow ups of the drawn order at the District Court without formal proof of the letter requesting the same does not entitle the applicant to make reliance on section 19 (2) of the law of Limitation as to my knowledge, the application of section 19(2) of the Act is not automatic. In the present case the applicant ought to have shown his efforts of making follow ups of the said drawn order which have not been attached in the affidavit of the applicant as the matter of proof to what the applicant's Counsel had argued. In view of that observation, I am of the settled view that the delayed eleven days by the applicant cannot be excluded in computing the number of days the applicant has delayed to lodge his appeal. The Court of Appeal of Tanzania clarified very well in the case of **Valere McGivern v. Salim Farkrudin Balal**,Civil Appeal No.386 of 2019(unreported) CAT at Tanga,the Court held:-

"Suffice to say, section 19(2) of LLA and holding in the decision cited

above reinforce the principle that computation of the period of limitation prescribed for an appeal, is reckoned from the day on which the impugned judgment is pronounced the appellant obtains a copy of the decree or order**. However, it must be understood that section 19(2) of LLA can only apply if the intended appellant made a written request for the supply of the requisite copies for the purpose of an appeal**."

In the light of the above holding of the Court and in relation to the circumstances pertaining to the present case, I find that the applicant has failed to prove if he made formal application to the district court requesting the certified drawn order which made his appeal dismissed. Therefore, exclusion could have only arisen if written or formal application could have been made absence of that the applicant was required to account all eleven days which he has delayed.

In the upshot and for the foregoing reasons, I find the application by applicant is unmeritorious hence is, accordingly, dismissed with costs.

It is so ordered.

W.P. Dyansobera
Judge
7.12.2021

This ruling is delivered at Mtwara under my hand and the seal of this Court on this 7th day of December, 2021 in the presence of Ms Priscilla Mapinda, learned Counsel for the applicant and Ms Rose Ndemeleje, learned Counsel for the respondent.

W.P. Dyansobera
Judge