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

MISC. CIVIL APPLICATION NO. 429 OF 2021

ZAINABU A. NZOTA ..... APPLICANT

VERSUS

OMARY H. MAHIMBI ..... RESPONDENT

(Arising from the decision of the Resident Magistrates Court of Morogoro in Probate Appeal No. 16 of 2014 dated 30th June, 2021)

RULING

Date of Last Order: 23/11/2021 &
Date of Ruling: 10/12/2021

S.M. KALUNDE, J.:

By way of Chamber Application, the applicant, ZAINABU A. NZOTA, lodged the present application under the provisions of **section 25(1)** of **the Magistrate Courts Act, Cap. 11 R.E. 2019**, seeking for extension of time within which to lodge an appeal out of time against the decision of the Resident Magistrates Court of Morogoro ("the appellate court") in **Probate Appeal No. 16 of 2014** dated 30th June, 2021. The application is supported by an

affidavit dully deponed by the applicant. The application is being counter attacked by a counter affidavit filed by OMARY H. MAHIMBI, the respondent.

The brief facts leading to the present application are as follows: through **Probate and Administration Cause No. 278 of 2018**, the Morogoro Urban Primary Court ("trial court") ruled in favour of the applicant and ordered a house situated at Misufini Area within Morogoro region be sold and the proceeds thereof be distributed among the beneficiaries of the estates of the deceased. Aggrieved by the decision of the trial court, the respondent filed **Probate Appeal No. 16 of 2014** before the appellate court. Upon consideration of the submissions from both parties the appellate court found the appeal to be meritorious. It went ahead to quash the proceedings and set aside the judgment and orders in Probate and Administration Cause No. 278 of 2018. Being aggrieved by the decision of the appellate court and being out of time the applicant filed the present application seeking to extend time within which to lodge an appeal out of time.

At the hearing, on the 23rd day of November, 2021, both parties appeared in person unrepresented. In support of the application the applicant contended that upon delivery of the judgment in Probate Appeal No. 16 of 2014 on 30th June, 2021 the learned appellate magistrate lost his father in law and was not in office for three weeks. When the magistrate came back at the end of July he said his laptop was damaged, hence the decision could not be delivered on time. The copies of the judgment were finally supplied to the applicant on 13th August, 2021 and being out of time he resorted to the present application.

In reply, the respondent admitted that Hon. Mrema, RM, who was handling the matter, lost his father-in-law. However, he said that he was able to secure the judgment earlier than the applicant. He could not remember when he obtained the copies but alleged that delay in obtaining the copy of the decision was due to the applicant's negligence.

In her brief rejoinder the applicant submitted that it was not true the decision was given earlier than the date it was certified at being ready for collection. In her view the decision was stamped as being ready for collection on 13th August, 2021, and that was when she collected the same. She insisted that delay in filing the appeal was not her fault as she was not supplied with copies of the decision on time. She concluded with a prayer that the application be granted so that she can challenge the impugned decision.

Upon consideration of the pleadings and submissions made for and against the application, the question for my determination is whether the application is merited. I propose to start the determination of the present application by examining the applicable law regulating the present application. as indicated above, this application was brought under section 25 (1) (b) of the Magistrate Court Act (supra) which read:

"25.- (1) Save as hereinafter provided; -

(a) ... N/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 therefrom to the High court****, and* ***the High court may extend the time for filing an appeal either before or after such period of thirty day has expired****."* [Emphasis is mine]

The above section provides for the period of limitation for appeals to this Court in matters originating from primary courts. The limitation period provided is thirty days from the date of the decision or order of the District Court. further to that the section empowers the Court to extend time for filing an appeal before or after such expiry of the period of thirty days.

The procedure for filing applications for leave to appeal out of time in matters originating from primary courts is provided for under **rule 3** of **the Civil Procedure (Appeals in Proceedings Originating in Primary courts) Rule 1984 GN 312 of 1964** which provides as follows;

> *"3.* ***An application for leave to appeal out of time*** *to a District Court from a decision or order of a Primary Court on* ***to the High Court from a decision of a District Court in the exercise of its appellate*** *on revisional jurisdiction* ***shall be in writing, shall set out the reasons why a petition of appeal was not or cannot be filed within thirty days after the date of the decision an order against which to is desired to appeal*** *and shall be accompanied by the petition of appeal or shall set out the grounds of objection to the decision or order".* [Emphasis is mine]

The wording of rule 3 of GN No. 312 of 1964 is clear that an application for leave to appeal out of time to this Court against a decision of the District Court in the exercise of its appellate jurisdiction "**must set out the reasons why a petition of appeal was not filed within thirty days after the date of the decision".** In accordance with the affidavit filed in support of the application the applicant has attributed the delay in filing the appeal to delay in being supplied with copies of the impugned decision.

It is elementary that the judgement in Probate Appeal No. 16 of 2014 was delivered on 30th June, 2021, in terms of section 25 (1) (b) of the Magistrate Court Act (supra) the applicant had thirty days to file her appeal counted from the 01st July, 2021 until the 30th July, 2021. The applicant did not file her appeal withing the prescribed period, allegedly awaiting copies of the impugned decision. The copies of the judgment were finally made available and collected by the applicant on 13th August, 2021 and the present application was filed on 26th August, 2021, approximately fifty six days from the date of the decision. The applicant contention was that she was late in filing the appeal because the District Court failed to supply her with the decision withing time.

The next issue for determination is whether the applicant's argument is tenable in law; and to determine that the immediate point of reference would be **rule 4** of GN 312 of 1964 which regulates the procedure for filing appeals. The respective rule provides that:

"4- (1) Every petition of appeal to a District Court from a decision or order of a Primary Court and every petition of appeal to the High Court from a decision or order of a District Court in the exercise of its appellate or revisional jurisdiction shall set out precisely and under distinct heads numbered consecutively the grounds of objection to the decision or order appealed against and shall be signed by the appellant or his agent.

(2) Every petition of appeal that the High Court shall be filed in duplicate."

My understanding of rule 4(1) quoted above is that an appeal to this Court, from a decision or order of a District Court in the exercise of its appellate jurisdiction, shall be by way of a petition of appeal which shall include the grounds of appeal and signed by the appellant or his agent. Rule 4(1) does not envisage a requirement to attach or append a copy of the judgment or decree sought to appealed against. This appears to be the position long established in several decision including the case of **Gregory Raphael vs. Pastory Rwehabula**, [2005] TLR 99 (HC); and A**bdallah S. Mkumba vs Mohamed. I. Lilame** (2001) TLR 326.

In **Gregory Raphael vs. Pastory Rwehabula** (Supra) the Court held that:

> *"But the position is different* ***in instituting appeals in this Court on matters originating from Primary Courts. Attachment of copies of decree or judgment along with petition of appeal is not a legal requirement. The filing process is complete when petition of appeal is instituted upon payment of requisite fees.*** *If attachment with copies of Judgment, as said by Mr. Rweyemamu, is a condition sine qua non in filing PC civil appeal in this Court, I think the rules i.e. The Civil Procedure (Appeals in Proceedings originating in primary Courts) 1964, 5 G.N. 312/1964 would have stated so and in very clear words. The rules do not impose that requirement. So it is not proper to impose a condition which has no legal backing."* [Emphasize is mine]

Guided by the above authority I am of the view that the applicant did not need to wait for the decision of the District Court for her to lodge the appeal. she had ample time within which to lodge her appeal in terms of section 25 (1) b of the Magistrate Court Act (supra). She did not utilize that time; accordingly, she cannot now complain that the delay was due failure in being supplied with the

copy of the impugned decision because rule 4(1) of the Civil Procedure (Appeals in Proceedings originating in Primary Courts) 1964 (supra) do not impose the requirement to append or attach a copy of the decision or decree sought to appealed against. For the fore going reasons I find no merit on this ground.

Although not canvassed in her submissions, the applicant had also alleged that the impugned decision was tainted with fatal irregulates which ought to be considered on appeal. according to paragraph 5 of the affidavit filed in support of the application the illegality was that "**the learned trial Resident Magistrate grossly erred in law and fact for not considering the Applicant who is the wife of the deceased as the lawful heir"**. I am aware of the position of law that, where there is a complaint of illegality in the decision extended to be impugned, extension of time will be granted notwithstanding the fact that the applicant has failed to sufficiently account for the delay in lodging the appeal. See **TANESCO vs. Mufungo Leonard Majura & 15 Others**, Civil Application No. 94 of 2016, Court of Appeal at Dar es Salaam (unreported).

In similar vein, I am also alive with the position that, for an illegality to amount to a sufficient ground for extension of time, it must meet the requisite criteria, for example it has been held that the illegality must be apparent on the face of records and not one that may be drawn from long arguments; that the illegality must be on a point of law of significance. This view seems to have informed the decisions of the Court of Appeal in **Mekefason Mandal & Others vs The Registered Trustees of the Archdiocese of Dar es Salaam** (Civil Appl. No.397/17 of 2019) [2019] TZCA 450; (30 October 2019 TANZLII); **Elias Masija Nyang'oro & Others vs Mwananchi Insurance Co. Ltd** (Civil Appl. No. 552/16 of 2019) [2021] TZCA 61; (02 March 2021 TANZLII) and **FINCA (T) Limited & Kipondogoro Auction Mart vs. Boniface Mwalukisa**, Civil Application No. 589/12 of 2018, Court of Appeal at Iringa (unreported).

In **Mekefason Mandal & Others vs The Registered Trustees of the Archdiocese of Dar es Salaam** (Supra) the Court of Appeal held that:

"It is crucial to point out however, that for this ground to stand, the illegality of the assailed decision must clearly be visible on the face of the record, and as we said in Lyamuya Construction Company Limited (supra), such point of law must be that of sufficient importance."

Similarly, in **FINCA (T) Limited & Kipondogoro Auction Mart vs. Boniface Mwalukisa** (Supra) having cited the its decisions in **VIP Engineering and Marketing Limited and Three Others vs. Citibank Tanzania Limited**, Consolidated Civil Reference No. 6, 7 and 8 of 2006 CA (Unreported); **TANESCO vs. Mufugo Leonard Majura and 15 Others** (Supra); **Principal Secretary Ministry of Defence and National Service vs Duram P. Valambhia** [1992] TLR 182; [[1992] TZCA 29; (03 July 1992); 1992 TLR 185 (TZCA)] and **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), the Court of Appeal (**Korosso, J.A**) stated thus:

"It is however, significant to note that the issue of consideration of illegality ***when determining***

> ***whether or not to extend time is well settled and should borne in mind that, in those cases were extension of time was granted upon being satisfied that there was illegality, the illegalities were explained.*** *For instance, in* ***Principal Secretary Ministry of Defence and National Service vs Duram P. Valambhia*** *[1992] TLR 182 the illegality alleged related to the applicant being denied an opportunity to be heard contrary to the rules of natural justice." [Emphasis mine]*

The Court went on to conclude that:

> *"Applying the above mentioned statement of principle to the application under consideration, I have not been persuaded by what is before the Court, on the alleged illegality in the trial court decision, to lead me to state that it is apparent on the face of it and thus can be discerned as a good cause for the Court to grant the prayers sought in this application."*

The Court went on to dismiss the application with costs to be taxed thereon. Like their justices in **FINCA (T) Limited &**

Kipondogoro Auction Mart vs. Boniface Mwalukisa (Supra), I have not been convinced that there an alleged illegality in the decision of the appellate court sufficient for me to state that it is apparent on the face of it and thus can be discerned as a good cause for this Court to grant the prayers sought in this application.

It is for the above reasons that I immediately dismiss the application with costs for lack of merits.

Order accordingly.

DATED at **MOROGORO** this **10th** day of **DECEMBER, 2021**.

S.M. KALUNDE

JUDGE