

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

MISC. CIVIL APPLICATION NO. 68 OF 2021

*(C/f the High Court of the United Republic of Tanzania at Arusha, PC Civil Appeal No. 19 of 2020,
Emanating from the District Court of Babati Civil Appeal No. 19 of 2019, Originating from Gallapo
Primary Court Probate and Administration Cause No. 8 of 2014)*

MWAFTARI TEMBEA KESSY APPLICANT

Versus

FABIAN TLEMA MASSAY RESPONDENT

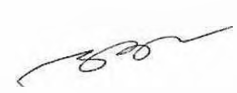
RULING

18th May & 15th July, 2022.

Masara, J.

The Applicant preferred this Application craving for extension of time to enable her to file an application for setting aside the dismissal order of this Court with respect of PC Civil Appeal No. 19 of 2020 dated 24/03/2021. The Application is supported by the affidavit of the Applicant. The Respondent filed a counter affidavit opposing the Application.

At the hearing of the application, the Applicant was represented by Mr. John M. Shirima, learned advocate while the Respondent appeared in Court in person unrepresented. The application was heard through filing written submissions.



Briefly, facts giving rise to this Application as obtained from the affidavits of the parties are that: The Respondent petitioned for letters of administration of the estate of the late **Pamphili Sakweli Ami** (hereinafter "the deceased") who died interstate on 03/09/2014. The petition was filed at Gallapo Primary Court (hereinafter "the primary court") vide Probate and Administration Cause No. 8 of 2014. The Applicant filed a caveat objecting the appointment of the Respondent. The primary court appointed both the Applicant and Respondent to administer the deceased's estate jointly. It is not indicated on the records what went wrong, but the estate was not administered due to misapprehensions among the appointed administrators. The Applicant complained to the primary court which had appointed them. On 02/08/2019, the primary court, having heard both parties, revoked the appointment of the Respondent as co-administrator. In lieu thereof, it appointed the Applicant as the sole administratrix of the estate.

The Respondent was dissatisfied by the decision of the primary court; thus, he appealed to Babati District Court ("the district court"). In its decision delivered on 16/01/2020, the district court nullified the decision of the primary court and restored the appointment of both the Applicant and the Respondent as co-administrators of the deceased's estate. That

decision aggrieved the Applicant. She filed her petition of appeal to this Court through the district court on 11/04/2020. After filing her petition of appeal, she was informed by the court clerk to go and wait for the summons from this Court, but she received none. On 18/05/2021, she travelled from Babati to Arusha to inquire what had befallen her appeal. On inquiry, she learned from undisclosed Court clerk that her appeal (PC Civil Appeal No. 19 of 2020) was dismissed on 24/03/2021 for want of prosecution. On 14/06/2021, the Applicant filed Misc. Civil Application No. 42 of 2021 before this Court seeking extension of time to file application for restoring the dismissed appeal. On 20/08/2021, the application was withdrawn with costs for the reason that the Court was not properly moved. On 14/09/2021, the Applicant preferred the instant application.

Submitting in support of the Application, Mr. Shirima submitted that the delay to file the Application was due to the fact that the Applicant was not aware in respect of proceedings of PC Civil Appeal No. 19 of 2020 until 18/05/2021 when she made a follow up of the same and thereby confirmed through the Court clerk that PC Civil Appeal No. 19 of 2020 was filed in this Court and it was indeed dismissed for want of prosecution on 24/03/2021. Mr. Shirima acknowledged that granting extension of time is in the discretion of the Court and that such discretion has to be exercised

judicially according to the rules of reason and justice and not according to private opinion or arbitrarily. In support thereof, he referred to the decisions in **Lyamuya Construction Company Limited vs Board of Registered Trustees of Young Women's and Christian Association of Tanzania, Civil Appeal No. 2 of 2010** (unreported) and **Daphine Parry vs Murray Alexander Carson [1963] E. A 546**. Mr. Shirima maintained that the Applicant was not aware of the proceedings in respect of PC Civil Appeal No. 19 of 2020 as she was not served with any summons to appear. According to Mr. Shirima, the Applicant acted in compliance with the law by filing her appeal in the District Court where she was directed to await until she was summoned but that was not done. He prayed that the application be allowed for the interests of justice so that the case proceeds on merits.

In rebuttal, the Respondent submitted that what the Applicant is doing is a delaying distribution of the deceased's estate to the lawful heirs. He fortified that once a party has filed a case/matter in court, it is the duty of that party to make a follow up of the matter to its finality. This, in his view, the Applicant abdicated. He added that the Applicant filed her appeal on 11/04/2020 but left it unattended until 18/05/2021 when she realized that it was dismissed for want of prosecution. He implored the Court to

hold that the Applicant was not diligent in pursuing the appeal as no effort was manifested through regular follow ups. He insisted that failure by the Applicant to enter appearance for more than a year entails that she had no intention to pursue the appeal. It was the Respondent's submission that the Applicant's assertions regarding being told to await summons from the High Court had no proof. In his view, the Applicant ought to have secured an affidavit from the said court clerk so as to prove what she averred in her affidavit and submission in support of the Application.

The Respondent maintained that even the withdrawn Misc. Application No. 42 of 2020 was due to the Applicant's endless litigation against the Applicant, proving lack of seriousness in pursuing her cases. That it is upon the Applicant to account for each day of the delay as decided in **Ngao Godwin vs Julius Mwarabu, Civil Application No. 10 of 2015** and **Sebastian Ndaula vs Grace Rwamafe, Civil Application No. 4 of 2014** (both unreported). He invited the Court not to condone the Applicant's endless cases aimed at hampering distribution of the deceased's estate to the lawful heirs. The Respondent faulted the submission by counsel for the Applicant that the Applicant was the lawful wife of the deceased referring to the objection raised by the Applicant in the primary court which showed that they were not living together.

I have considered the affidavits of the parties as well as the rival submissions filed by counsel for the Applicant and that of the Respondent. The issue for determination is whether the Applicant has advanced sufficient reasons to warrant her the extension of time sought.

Sufficient cause for the delay is *conditio sine qua non* for an application for extension of time to be granted. In the case of **Lyamuya Construction Company Limited vs Board of Trustees of Young Women's Christian Association of Tanzania** (supra), guidelines for courts to take into consideration in extending time were established. It was *inter alia* held:

"As a matter of general principle, it is the discretion of the Court to grant extension of time. But that discretion is judicial, and so it must be exercised according to the rules of reason and justice, and not according to private opinion or arbitrarily. On the authorities, however, the following guidelines may be formulated:

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

The question before me is whether the Applicant is covered by the above established parameters so as to warrant her the extension of time sought.

In the Applicant's affidavit, the main reason for the delay is that she filed

her appeal in the district court on 11/04/2020 but was told by the Court clerk to wait for the summons from the High court. That, she was not served with any summons. Further, that upon making follow up in this Court on 18/05/2021, she was told that her appeal was dismissed on 24/03/2020. Thus, she was not aware of existence of PC Civil Appeal No. 19 of 2020 pending in this Court. The Respondent faulted the Applicant's behaviour stating that she was not serious in pursuing her appeal as she stayed idle for more than a year without making any inquiry to know the status of the appeal she had filed.

Paragraph 3 the Applicant's affidavit states that the Applicant filed her appeal in the district court on 11/04/2020. She relied on the payment receipt (Annexure MK) to support her contention. I have looked at the said annexure. It is undated but was issued in February, 2020. Further, Annex MK3, which is the petition of appeal filed in the district court, is dated 11/02/2020. Thus, the two annexes relied upon by the Applicant do not bear relevance to what the Applicant stated in her affidavit, and the submission thereof. The Applicant repeatedly stated in her affidavit and the submission that she filed her petition of appeal in the district court on 11/04/2020; but, the annexures in support of her averment bear a different date. It is the finding of this Court that the Applicant's contention

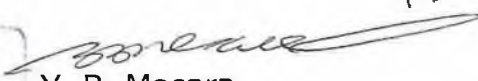
that she filed a petition of appeal in the district court is not backed up by any evidence.

Regarding the reasons for the delay, I am in agreement with the submission by the Respondent that the Applicant has failed to show that she was diligent in pursuing her appeal. Having filed her appeal in the district court as she purports, the Applicant made no effort to inquire on the progress or status of the said appeal. The fact that the said petition of appeal was filed on 11/04/2020, but the Applicant made inquiry of the same on 18/05/2021, more than a year later, is proof that the Applicant was not diligent in pursuing her appeal. In my view, failure to inquire into the status of the appeal for a period of one year proves laxity on the part of the Applicant and the delay is inordinate. The Applicant has proved apathy and sloppiness in pursuing her appeal. In both the affidavit and the submission, there is no any attempt to account for the delay of the whole period of more than one year by the Applicant.

Incidentally, the proceedings of this Court in respect of PC Civil Appeal No. 19 of 2020 reveal that on diverse dates the Respondent herein, who was the Respondent thereat attended. For example, it shows that the Respondent attended on 27/07/2020 and 23/11/2020, which entails that he had notice of existence of the said appeal. I have considered the fact

that the Applicant and the Respondent are co-administrators of the deceased's estate, therefore it is difficult to fathom that summons was issued to the Respondent but was not availed to the Applicant. Furthermore, the Applicant does not indicate which steps she took upon realising that she had not received summons as allegedly informed. As the record speaks, the case between the parties herein has been in court corridors since 2014. As submitted by the Respondent, the deceased's estate has not been administered to date. That is very unfortunate and is quite unfair to the lawful heirs of the deceased's estate who are waiting for the distribution. It is a settled tenet of law that litigation must come to an end. Entertaining endless and suits is unhealthy to the tenets of justice and is invariably a denial of justice to those entitled. In the circumstances herein, allowing the Application will be condoning deliberate and apparent sluggishness, which I am not prepared to do.

From the foregoing, I am not convinced with the grounds put forth by the Applicant. The Application is devoid of merits. It is dismissed in its entirety. This matter being a family issue arising from administration, I direct that each party bears its own costs. It is so ordered.



Y. B. Masara

JUDGE

15th July 2022