

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

SONGEA DISTRICT REGISTRY

AT SONGEA

MISC. CIVIL APPLICATION NO. 10 OF 2021

(Arising from Misc. Probate and Administration Application No. 02 of 2020 Songea District Court at Songea, which originated from Probate and Administration Cause No. 18 of 2015 at Songea Urban Primary Court)

FATUMA ALLY HAKIMU 1ST APPLICANT

HALIMA ALLY HAKIMU 2ND APPLICANT

KAISI ALLY HAKIMU 3RD APPLICANT

ANIFA ALLY HAKIMU 4TH APPLICANT

VERSUS

AHMAD SELEMANI (Legal Representative of

KALASI HAKIMU ALLY, Deceased) RESPONDENT

RULING

Date of last Order: 19/07/2022

Date of Ruling: 18/08/2022

MLYAMBINA, J.

Through chamber summons supported by a sworn joint affidavit of the Applicants. The Applicants filed this application for leave to file their appeal out of time prescribed by the law. The application was made under the provision of *section 25 (1) (b) of the Magistrates Courts Act*

[Cap 11 R E 2019]. The Respondent did not file counter affidavit to contest the application.

By consent of the parties, this application was disposed of by way of written submission. The Applicants appeared in person while the Respondent enjoyed the service of Mr. Eliseus Ndunguru, learned advocate. The Applicants submitted that; they have been aggrieved by the decision of Songea District Court specifically on its order dated 7th June, 2018 in which the Applicants were denied the extension of time to file revision against the decision of Songea Urban Primary Court out of time prescribed by the law.

The Applicants averred that; they have reasons which they categorised under two limbs. First reason is illegality of the decision they intended to challenge if the extension of time will be granted to them. The trial Court ordered the sale of the house located at Plot No. 427 Block "V" Majengo area, within Songea Municipal. The order was tainted with illegalities which are apparent on the face of record. The trial Court ordered the sale of the said house based on the complaint tabled before the Court by two heirs against the first Applicant and Hawa Said. Other Applicants were not afforded with the right to be heard. Also, the proceedings was conducted in absence of the administrator of the

estate. The reason which was not considered by the District Court as a sufficient reason to warrant them with the extension of time to challenge the trial Court decision out of time.

The Applicants submitted further that, apart from ordering the sale of the said house, the trial Court sold the house itself through the Court Broker namely, Twins Auction Mart Co. Ltd and Court Broker. The Applicants said that the trial Court had no jurisdiction to sale the house. Its jurisdiction ended on appointing the administrator and he is the one who is vested with the power among other powers is to sell the house if any. They referred the act of the trial Court to be illegality which can be a good cause for extension of time, they supported their argument with the case of **Kalunga and Company, Advocate v. National Bank of Commerce Ltd** (2006) TLR 235.

I went through the argument argued by the Applicant on issue of the illegality. This Court finds, as rightly as argued by the Applicant, that the prime role of the Court in Probate Case is to appoint the administrator of the estate of the deceased. That is the position under *Section 2 of the fifth schedule of the Magistrates Courts Act [Cap 11 RE 2019]* provides.

It is a settled law that, where an issue of illegality is raised as a reason for applying for extension of time, such reason amount to good reason. Whether or not the reasonable explanation has been given by the Applicant under the rule of accounting for the delay. See the case of **Hamisi Mohamed (as administrator of the Estate of the late RIsasi Ngawe) v. Mtumwa Moshi (as administratrix of the Estate of the late Moshi Abdallah)**, Civil Application No. 407/17 of 2019, Court of Appeal of Tanzania at Dar es Salaam; **The Principle Secretary, Ministry Defence and National Service v. Devram Valambhia** [1992] TLR 182.

Moreso, the illegality alleged has to be on face of record and not otherwise, as it was stated in the case of **Hamisi Mohamed (as administrator of the Estate of the late Risasi Ngawe)** (*supra*). The Applicants managed to satisfy this Court as to the issue of illegality for the grant of an extension of time.

The second limb is a reason based on technical delay. The Applicants took us from paragraph 25 of the affidavit which revealed that, after the Applicants being denied the extension of time in **Misc. Probate and Administration Cause No. 02 of 2020** on 20th day of November, 2020, they immediately applied for a copy of the Ruling and

Order of the said decision so that they can appeal to this Court. They thought the District Court exercised its original jurisdiction when entertaining their application, to wit the law applicable would be The *Law of Limitation Act [Cap 89 RE 2019]*, in which the time limit to appeal is 90 days.

They filed their appeal on 14th January, 2021. Unfortunately, it was struck out on 17th June, 2021 for being filed out of time and they were told that the law applicable is Magistrates Courts Act (supra). Thereafter, on 19th July, 2021, the Applicants filed **Misc. Application No. 6 of 2021** which was struck out again for being made under wrong citation of the law. As a result, on 19th November, 2021 the Applicants filed this application seeking this Court to grant them extension of time to file their appeal out of time prescribed by the law. They want to challenge the decision of Songea District Court in **Misc. Application No. 02 of 2020** in which the Court denied them the leave to file revision against the decision of the trial Court order, dated on 7th June, 2018.

The Applicants believed that they were diligent and the delay to file appeal against the decision of the Songea District Court which denied them the extension of time to file revision was excusable. They buttressed their argument with the case of **Stephen Ngalambe v.**

Onesmo Ezekia Chaula and Another, Civil Appeal No. 27 of 2022, Court of Appeal of Tanzania at Iringa, page 14-15 (unreported).

After carefully consideration of the Applicant's submission, the Court is of the findings it will be wise to start with what amount to technical delay in which the Applicants have relied upon. Court of Appeal sitting at Dar es Salaam in the case of **Bank M (Tanzania) Limited v. Enock Mwakyusa**, Civil Application No. 520/18 of 2017 appreciated the meaning of technical delay which was stated in the case of **Fortunatus Masha v. William Shija & Another**, [1997] TLR 154; as follows:

A distinct should be made between cases involved real and actual delays and those like the present one which only involve what can be called *technical delays in the sense that the original appeal was lodged in time but the present situation arose only because the original appeal for one reason or another has been found to be incompetent and a fresh appeal has to be instituted*. In the circumstances, the negligence if any really refers to the filing of an incompetent appeal not a delay in filing it. The filing of an incompetent appeal

having been duly penalized by striking it out, the same can not be used yet again to determine the timeousness of applying for filing the fresh appeal
[Emphasis mine]

To the contrary, the Applicants appeal was lodged out of time to begin with, and it was struck out for the same reason. It is a cardinal rule that, the time which referred as technical delay is required to be excluded from the period of delay but in case at hand there is no such delay as claimed by the Applicants but ignorance of the law which can not be as a reason to be granted the extension. The case of **Stephen Ngalambe** (*supra*) cited by the Applicants is distinguishable to the circumstance of the case at hand.

Notwithstanding the argument above, the Applicants have to account for each day of delay. The position of the law was stated in the case of **Sebastian Ndaula v. Grace Rwamafa, Legal personal Representative of Joshwa Rwamafa**, Civil Application No. 4 of 2014 is very clear that, the Applicant is required to account for each day of the delay. Also, in the case of **Bushiri Hassan v. Latifa Lukio Mashayo**, Civil Application No. 03 of 2007, the Court of Appeal of Tanzania at Arusha, the Court has this to say:

Delay of even a single day, has to be accounted for otherwise there would be no point of having rules prescribing period within which certain steps have to be taken.

Being guided by the authority quoted above, it is evident that, the last application of the Applicants was struck out on 4th November, 2021 for wrong citation of the law. The application at hand was lodged on 19th November, 2021. Fifteen days lapse after the last application was struck out for being made under wrong citation of the law. I went through the Applicant's affidavit and there is no any explanation as to what hindered them to file the application immediately after the last one was struck out. In short, the Applicants did not account for the fifteen days of their delay.

As for the failure of the Respondent to file affidavit in reply which is well known as counter affidavit. It is settled that, where the Respondent does not lodge an affidavit in reply despite being served, it is taken that he does not dispute the content of the Applicant's affidavit. Further to that, he is not allowed to challenge matter of fact but he can in matter of law if he will appear during the hearing. See the case of

William Getari Kegege v. Equity Bank and Another, Civil Application No. 24/08 of 2019, Court of Appeal of Tanzania at Mwanza.

From the record, the parties agreed to dispose the application by way of written submission and the schedule was as follows: The application be disposed by way of written submissions. The Applicants to file written submission in chief by 16/06/2022, Reply written submission be filled by 30/06/2022, Rejoinder if any by 8/7/2022, and Mention on 19/7/2022. But the Respondent filed his reply on 29th day of July, 2022. Out of the schedule agreed before the Court.

Furthermore, the Respondent in his reply he argued the matter of fact raised by the Applicant in their affidavit contrary to the requirement of the law. In the case of **Khalid Mwisongo v. M/S Unitrans (T) LTD**, Civil Appeal No. 56 of 2011, the Court of appeal of Tanzania siting at Dar es Salaam elaborated that, the purpose of filing a written submission is to enable the Court to better understand the nature of the case, the issue involved and ultimately adjudicate upon and determine the case properly. The Court went farther and said that, failure to file a written submission, the party waived his opportunity to state his case to the Court.

In the case of **Jassie Company Ltd v. Cement Distributors (EA) Ltd**, Misc. Civil Application No. 133 of 2021, High Court of Tanzania at Mwanza, the Court held that, it is the settled principle of law that failure to file written submission as ordered by the Court is a manifestation of failure to prosecute the matter concerned. From the record the Respondent failed to file counter affidavit, if that was not enough, he failed to file a written submission on time as per Court order. Court order should be respected and complied. See the case of **TBL v. Edson Dhobe**, Miscellaneous Civil Application No. 96 of 2006, Court of Appeal of Tanzania.

For that account, this Court will not take into consideration the written submission filed by the Respondent a month later from the date he was ordered to do so. If the written submission will be entertained will lead to a chaos. People will always do what they want to instead of obeying the Court orders and it will set bad precedent.

At this juncture, from the above reasons, I hereby grant leave to the Applicants to appeal out of time prescribed by the law solely on the ground of illegality. The Applicants have to file the appeal within 14 days from today. Order accordingly.



Y. J. MLYAMBINA

JUDGE

18/08/2022

Ruling delivered and dated 18th August, 2022 in the presence of the 1st, 2nd and 4th Applicants in person and in the absence of the 3rd Applicant and the Respondent. Right of Appeal explained.



Y. J. MLYAMBINA

JUDGE

18/08/2022