

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

MBEYA DISTRICT REGISTRY

AT MBEYA

MISCELLANEOUS CIVIL APPLICATION NO. 35 OF 2021

(Originating from Probate Appeal No. 8 of 2021 of the Mbeya District Court in Probate Cause No. 34 of 2013 of the Uyole primary Court of Mbeya District)

Between

DAVID EDWARD MWANGONELAAPPLICANT

VERSUS

ALPHONCE EDWARD MWANGONELARESPONDENT

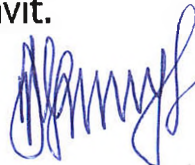
RULING

Date of last order: 21st July, 2022

Date of ruling: 11th August, 2022

NGUNYALE J.

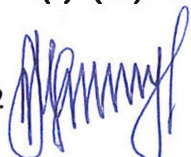
By chamber summons filed under section 25(1)(b) of the Magistrates' Courts Act [Cap 11 R: E 2019], the applicant, David Edward Mwangonela is moving the Court for an order of extension of time within which to lodge an appeal to this court against the decision of the District Court of Mbeya in Probate appeal No. 8 of 2020. The application is supported by an affidavit sworn by the applicant. The application is resisted by the respondent through his counter affidavit.



At the hearing of the application Ms. Febi Cheyo learned advocate appeared for the respondent. She informed the court that both parties wished the application to be disposed by Written submission. Applicant's submission was filed by Luka Ngogo of Zest Law Attorney whereas that of the respondent was filed by Joyce Kasebwa of Joyce M. Kasebwa Law Chamber.

The appellant's counsel Mr. Ngogo submitted that the delay to file the appeal within time was because the applicant was not supplied with the copies of judgment in time by the court. He added that after judgment they applied to be supplied with the same but by the time they were supplied with, they were already out of time. He was of the view that without copy of judgment no sound ground of appeal would be prepared as the judgment was just read in summary.

The others reason was illegality in the judgment, elaborating Mr. Ngogo submitted that the court had no jurisdiction to determine the matter as it was filed out of time. He added that illegality is one of the sufficient reasons for the extension of time. The case of **Charles Zephania Mwenesamo v Daniel Samwel Chuma**, Civil Application No. 274 of 2015, CAT at DSM, was cited in support of the argument. He contended that illegality is deposed under para 12(i)-(iv) of the applicant's affidavit.

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In reply Ms. Kasebwa submitted that appeals originating from primary courts there is no requirement to attach judgment. She added that judgment not being a necessary document to accompany the petition of appeal, waiting for it to file the appeal cannot be ground for extension of time. He cited the case of **Sam Ndege & Others v Agness Erasto Mlunga**, PC. Civil Appeal No. 64 of 2020, HC at Mwanza, in which it was held that there is no need to wait judgment for filing petition of appeal on cases originating from primary court.

It was further submitted that the applicant has not accounted for each day of delay. She cited the case of **Loswaki Village Council v Shibeshi Abebe** [2000] TLR 204. It was the view that the applicant has not accounted for eight days from the date he was supplied with copies to when the application was filed.

On issue of illegality, she submitted that the same must be on the face of record, and in this case the appellant has failed to show that it is on the face of records. She stated that the enumerated grounds require long process of reasoning as such cannot be said the illegality complained of is on the face of record. She cited the case of **Tanzania Harbours Authority v Mohamed R. Mohamed** [2003] TLR 76 to support the argument.



During rejoinder Mr. Ngogo restated his earlier submission. Most part of his rejoinder was not on matters raised in reply submission but it was new matters. For instance, the issue of perusal of records of the first appellate court and delivery of judgment in summary.

I have considered the argument for and against the application. The only issues calling for my determination are;

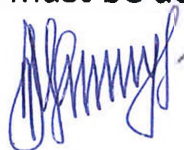
- 1. Whether waiting for a copy of judgment from appeal originating from primary court is a sufficient reason for extension of time.*
- 2. Whether there is illegality in the judgment of the lower courts.*

Starting with the issue of waiting for copies of judgment, the relevant law is section 25(1)(b) of the Magistrates' Courts Act [Cap 11 R: E 20019] which provides that;

25(1) Save as hereinafter provided

(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 there from to the High Court; and the High Court may extend the time for filing an appeal either before or after such period of thirty days has expired.

The other legislation which governs appeal from Primary Court to the District Court and this court is the Civil Procedure (Appeals in Proceedings Originating in Primary Courts) G.N No. 312 of 1964. The laws above do not prescribe that a copy of judgment must be accompanied with petition



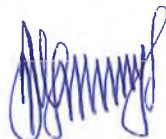
of appeal. Rather it requires the intending appellant to file petition of appeal within thirty days from the date of judgement and the District Court could dispatch the documents to the High Court. See the case of **Abdallah Mkumba vs. Mohammed Lilame** [2001] TLR 326 and **Gregory vs Pastory** [2005] TLR 99

The appellant's assertion that he applied for being supplied with a copy of judgment and was waiting to be availed with the same in order to file the appeal is therefore unmerited since there is no such requirement.

As to whether this application was filed in time need not to take much of time as it has already been decided that appeals originating from primary through District Court to this court there is no requirement of attaching copy of judgment in instituting the appeal. Hence discussing whether the applicant filed in time after being supplied with copies is superfluous.

With regard to the illegalities, I am mindful of the settled law that where the point of law at issue is illegality or otherwise of the decision being challenged, that by itself constitutes sufficient cause. In the case of **Principal Secretary Ministry of Defence and National Service v. Devram P. Valambhia** [1992] TLR 387 the court 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 the record right.'

However, in the case of **Tanzania Harbours Authority v. Mohamed R. Mohamed** [2003] TLR 76 the court emphasized that time will not be extended in every situation whenever illegality is alleged as an issue by the applicant. It all depends on the circumstances of each case and the material placed before the court.

Under para 12 of the affidavit the applicant has pegged four issues which constitute illegalities, **one** that the decision rested on Probate Cause No. 1 of 2012 which was not at issue, **two**, that parties were not accorded right to be heard in regard to Probate Cause No. 1 of 2012, **three** issue of jurisdiction of the court and **fourth**, that the claim was time barred.

During submission Mr. Ngogo did not elaborate in detail the point of illegalities whereas Ms. Kasebwa had the view that the enumerated illegalities are not on the face of record.

I have gone through the judgments of the lower courts and I am certainly that the first and third issue are reflected in the records of the first appellate court. I also understand that this application traces its root in Probate cause No. 34 of 2013 of the Primary Court of Mbeya at Uyole. On how Probate Cause No. 1 of 2012 of Primary Court of Mbarali at Ilongo



was subject to discussion in the first appellate court is a matter which will be only resolved in its proper forum and not at this stage. Likewise, the issue of jurisdiction of the courts, it was raised for the first in the District Court and the applicant considers the court was not enjoined to lay its hand on it which should the applicant manage to establish it in the appeal constitutes an illegality.

In the event, considering the circumstances pertaining to this case, I find that the applicant has managed to illustrate good cause pegged on illegalities that entitle this Court to grant him the extension of time to file the intended appeal. This application is consequently allowed without costs considering that parties are of the same family. Order accordingly.

DATED at MBEYA this 11th day of August, 2022.




D.P. NGUNYALE
JUDGE