

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

[ARUSHA DISTRICT REGISTRY]

AT ARUSHA

MISC. CIVIL APPLICATION No. 86 OF 2022

*(Arising from PC Civil Appeal No. 3 of 2012, in the High Court of Tanzania at Arusha,
Originating from Civil Appeal No. 47 of 2011, Originally Probate and Administration
Cause No. 27 of 1996)*

MGENI ALLY.....1ST APPLICANT

YUSUPH MACHA.....2ND APPLICANT

VERSUS

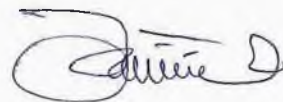
SELEMANI ALLY HATIBU..... RESPONDENT

RULING

12th & 28th October 2022

TIGANGA, J.

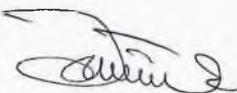
This is an application for extension of time to file the Notice of Appeal out of time so that the applicants can be able to appeal to the Court of Appeal of Tanzania against the ruling and order of Hon. Massengi, J., in Civil Appeal No. 3 of 2012. They also asked this Court to grant any other order it deems fit and just to grant.



The application was filed by way of chamber summons under section 11(1) of the Appellate Jurisdiction Act [Cap. 141 R.E 2019], rules 10, 45(a) and 47 of the Court of Appeal Rules, 2009 as amended from time to time. The chamber summons was supported by the affidavit of the applicants setting forth the grounds of the application and the reasons for delay. For purposes of brevity, I will not reproduce them here but, will consider along with the submissions filed in support of the application.

The application was opposed and disputed by the respondent who filed the counter affidavit in that regard. With leave of the Court and consent of the parties, hearing of the application was conducted by way of written submissions.

In support of the application, Mr. Michael Lugaiya, Learned Counsel for the applicant started by adopting the chamber summons and affidavit to be part of his submissions. He further submitted that; the applicants herein were the appellants in the High Court vide Pc. Civil Appeal No. 03 of 2012 arising from the ruling of the District Court of Arusha at Arusha concerning the unlawful sale of the estate by the 1st respondent.

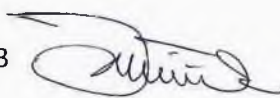
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The High Court decided the appeal in favour of the respondent in the judgment dated 15th day of January 2013. A copy of the judgment was attached to the affidavit of the 1st applicant as annexure "MAI" to form part of the submissions.

According to him, the applicants were dissatisfied with the judgment and thus, they initiated the process of appeal to the Court of Appeal of Tanzania. However, due to the complexity and legal technicalities of the matter involved, the applicants' advocate stepped down from representation due to some alleged unforeseen challenges.

Following such decline by the advocate, the applicants instructed Mr. Rumende, Learned Advocate to represent them and take necessary steps to pursue the appeal. Moreover, to their surprise and disappointment, Mr. Rumende the entrusted professional duty despite several reminders made to him, the counsel argued. He further submitted that, the applicants decided to seek legal assistance from Legal and Human Rights Centre to pursue the appeal.

Unfortunately, the efforts were somewhat fruitless because the Center did not clearly respond to the request as expected due to the reason that,

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they were constrained with human resources in both, the office and court work. But they could only assist in preparing the necessary documents, the advocate said.

According to them, the Legal and Human Rights Centre advised the applicants to make follow-ups to Advocate Rumende. That, they acted upon their advice with no success. Therefore, they decided to hire another Advocate, Mr. Lugaiya told the court. It was further submitted that, as they were looking for the other Advocate, the applicants and their family members were faced with several malicious criminal cases. That, they were prosecuted before the District Court of Arusha at arusha for Criminal trespass through Criminal Case No. 432 of 2012.

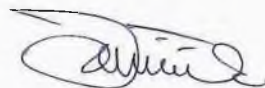
Following that said case, they were denied bail and remanded in Kisongo Prison for two months until when they appealed to the High Court vide Criminal Appeal No. 05 of 2013 against such bail denial whereby the appeal was allowed and the bail granted, Mr. Lugaiya said. The judgment was annexed to the affidavit as "MA 2" To form part of it.

Mr. Lugaiya stated further that, while the applicants were in prison, their sister one Zubeda Ally Khatibu who was remanded with them, fallen

sick seriously and died two weeks later after being released on bail by the High Court. Because of that, the applicants were massively psychologically traumatized, the factor which contributed much to the delay.

The learned counsel submitted further that, during trial before the District Court, they were found not guilty of the offence and were consequently acquitted by the court vide the decision delivered on 25th March 2015. The copy was attached. That, the District Court inferred that, there was no criminal trespass since the issue of ownership had not been determined. He further argued that, since the respondent and the alleged illegal buyer who was the complainant had featured as one of the prosecution witnesses, the applicants were advised by the court to deal with the issue of ownership before the District Land and Housing Tribunal for determination of the lawful owner.

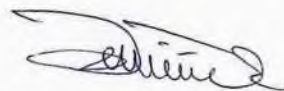
That, they the applicants were arrested and detained again on 2nd of July 2018 together with other family members at the central police station of Arusha for malicious damage to property and the criminal charges were commenced at the District Court of Arusha in Criminal Case No. 293 of 2018 against the son one Lumu Fredrick Bossa.



The Counsel went on saying that, the present charge is not different from the previous one which was dismissed by the District Court. That, on 05th September 2018 the applicants filed an application for extension of time to file a Notice of Appeal. It was struck out because their first Advocate had already made it but he did not make a follow up to file the intended appeal. The said notice of appeal was withdrawn, the Counsel said. The Copy of the order is attached and marked annexure "MA4."

Mr. Mgaiya said more that, the applicants' second application for extension of time was struck out because they had not joined the late sister who was incapable of filing the application. The copy of the said ruling is attached and marked annexure "MA5." The counsel went on submitting that, the applicants did not sleep over their right instead, they filed another Application No. 64 of 2020 for extension of time which was also struck out on the reasons that, the court was not moved properly.

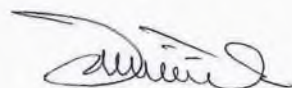
It was further stated that, in the efforts to search for justice, they filed another application for extension of time, which is an Application No. 52 of 2021 which was also struck out on 16th June 2022 because the applicants joined an illegal buyer, the approach which was declared to be wrong.



The counsel ended up the submission insisting and urging this Court to allow the application for avoidance of irreparable loss.

On conclusion, the counsel submitted that, the applicants intend to appeal to the Court of Appeal of Tanzania. That, the illegality that the respondent could not act as an administrator of the state of the deceased in respect of the property which had already been distributed by the deceased and handed over to the beneficiaries before his death.

However, the counsel conceded that this is not the case of administration of the estate. To buttress his position, he cited the case of **Magnet Construction Limited vrs Bruce Wallace Jones**, Civil Appeal No. 459 of 2020 and **Lyamuya Construction Co Limited vrs The Registered Trustee of the Young Christian Association of Tanzania**, Civil Application No. 02 of 2010. In these cases, it was held that, the point of law of sufficient importance such as illegality of the decision sought to be challenged could constitute a sufficient reason for extension of time, he said. Thus, the applicants have demonstrated the facts which constitute the good cause for the application to be granted.



In the reply, Mr. John Mseu, learned counsel for the respondent, submitted in opposition of the application by first categorizing the series of applications made by the applicants into two, previous applications and the application on merit. He submitted that, on 26th September 2018 the court allowed the applicants to withdraw the application with costs upon satisfaction that the notice of appeal was filed in the Court of Appeal of Tanzania by the applicants way back on 30th January 2013 and was still pending in the said Court.

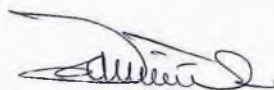
That, on 21st June 2019 the same applicants filed in this Court Misc. Civil Application No. 62 of 2019 seeking for an order of extension of time for them to file the Notice of Appeal to the Court of Appeal of Tanzania. However, that application was objected by the respondent by raising a preliminary objection on point of law challenging its competence. That, the objection was that the applicants wrongly joined the deceased Zubeda Ally as the 2nd Applicant.

Mr. Mseu further said that, on 14th February 2020 the applicants filed the 3rd application, and on 28th April 2020 they filed a notice of intention to withdraw the said application the request which was granted. Moreover, on 06th July 2021 the applicants once again filed the 4th application for extension

of time to file the Notice of Appeal out of time which was registered as Misc. Civil Application No.52 of 2021. This application was also struck out as the applicants joined the illegal buyer; That, the applicants have filed consecutively four defective applications from 2018 to the present.

With regard to the one he termed as an application on merit, the 5th application, after having submitted on the previous four unsuccessful applications for the extension of time the counsel argued that there is a controversy on what the record shows. That, the record shows that, the applicants say the instructed Mwaluko & Co. Advocates and not Advocate Rumende as it is argued, he said. That, it is clear that there was no delay in filling the Notice of Appeal by the applicants as the said notice was lodged in court on 30th January 2013 and therefore, the issue of negligence to the Advocates Mwaluko or Rumende does show off.

Mr. Mseu argued that, there is neither evidence that Advocate Rumende was instructed nor the fact that he was paid for the services which he was expected to render to the applicants. To the contrary, annexures SAH2 and SAH3 show that, the service was rendered to the applicants by Advocate Mwaluko and Co. Advocates.

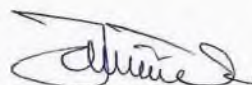


Mr. Mseu contended that this application was unnecessary. That, the proper avenue was to file the application in the Court of Appeal for extension of time to file the appeal itself as there was already the existence of a valid Notice of Appeal.

To buttress that position, he cited the case of **Godwin Ndewesi & Karoli Ishengoma vs Tanzania Audit Corporation** [1995] TLR 200 CAT where it was held that:

"An oversight on the part of the Counsel of the party does not constitute sufficient cause for exercise of the courts discretion in his favour."

Also, the cases of **Umoja Garage vs The National Bank of Commerce** [1997] TLR 109, and **Bushiri Hassan vrs Latifa Lukio Mashayo**, Court of Appeal, Civil appeal No. 03 of 2007 quoted with approval in the case of **Dawi Akko vs Petro Ingi & 2 Others**, Misc. Civil Application No. 31 of 2018 on the importance of the applicant in the applications of this nature to account all days of delay before he is entitled to the extension of time.

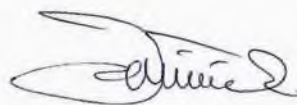


In the counsel's view, the applicant has failed to account all days of delay from 15th January 2013 to 20th July 2022 when this application was filed.

Mr. Mseu argued further that, the allegations by the counsel for the applicants that the illegal buyer has been maliciously filing criminal cases against the applicants are unfounded because the cases were all bailable.

Finally, Mr. Mseu submitted that, there is no illegality on the part of respondent in administering his late father's estate. Also that, the application is already overtaken by events because the respondent has already filed accounts in Probate and Administration Cause No. 27 of 1996 way back in 2009 and he is no longer the administrator of the said estate. That, all complaints raised or intended to be raised by the applicants were dealt by in the said probate proceedings. That, the respondent has been subjected to multiple suits while his capacity as Administrator has already ceased, and the said multiple suits cause unnecessary costs to him.

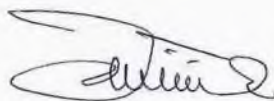
In rejoinder, counsel for the applicants did not come up with any new issue. He reiterated the submission in chief. For time management purpose, that part will never be reproduced.

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After going through both submissions by counsels, I consider the issue to be determined by this court to be whether this application is meritorious?

Before indulging to the merits of the application, I find it necessary to point out some issues which are not in disputed. There is no dispute that after the delivery of the decision sought to be challenged, on 30th day 2013 the applicant filed the notice of appeal to the Court of Appeal. That, that notice remained valid up to 13th June 2019 when it was marked withdrawn by the Deputy Registrar of the Court following the request by the counsel for the applicants. That can be proved by the order of the Court of Appeal signed by B.A Mpepo, DR dated 13th June 2019. The reasons as to why the notice was withdrawn have not been made clear to me. Therefore, it is also not certain as to why, once again, the same parties who withdrew the Notice are now before this court seeking for extension of time to file the Notice which the applicant willingly withdrew.

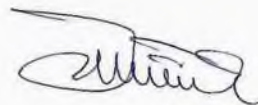
While the reasons are not disclosed as aforesaid, let me now go to the merit of the application. In dealing with this application, I find it important to say that the provision upon which the court has been moved which is section 11(1) of the Appellate Jurisdiction Act (supra) this Court has powers



to extend time for an aggrieved party of the decision of the High Court to file the Notice of Appeal.

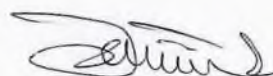
In line with the above principle, it is instructive to find that the general rule is that every person intending to move the court to extend time must give reasons as to why he did not take that legal action within the time prescribed by law. The principle governing the grant or refusal of the application for extension of time has not been defined by statute. However, there is plethora of case laws on the call. One of those cases is, the case of **Lyamuya Constructions Limited Company Ltd vrs Board of Registered Trustee of Young Women's Christian Association of Tanzania**, Civil Application No. 02 of 2010 (unreported).

In this Case the Court of Appeal of Tanzania set the thresholds and guidelines to be observed when determining applications of this nature. **First**, that the applicant must account for the whole period of delay. **Second**, that the delay should not be inordinate. **Third**, that the Applicant must show diligence, not apathy, negligence, sloppiness in the prosecution of the action that he intended to take. **Fourth**, that there is illegality which arises from the violation of fundamental legal principles. Upon the applicant meeting such thresholds, the court shall be enjoined to extend time sought.



Computing from 15th January 2013 when the impugned decision was delivered up to 20th July 2022 when this application was filed, it is about 9 years and 10 months as such. Going by the principles in **Lyamuya Construction case** (supra), the applicants must as a matter of law, account for all these days of delay. Accounting should as a matter of principle start with the affidavit filed in support of the application and later of course by way of elaboration, in the submissions. In a bid to satisfy myself as to whether the applicants have accounted the delayed days, I have traversed affidavit and the submissions filed by the applicant. I find no statement other than the series of events complaining about the arrest of the applicants allegedly caused by the respondents and the person they refer as "illegal buyer."

Furthermore, in the affidavits another complaint is the misfortunes and disappointment caused by the Advocates who were allegedly instructed by the applicants caused by their failure to take necessary steps within time and promptly. The counsel submitted how they parted with their first Advocate Mr. Mwaluko, before they engaged Mr. Rumende, learned counsel to take over, who according to them, despite being so engaged, he did not according to them take necessary steps. In spite of all these complaints, the applicants

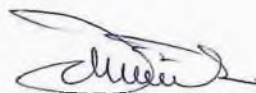


tendered no evidence to justify them, and did not connect the complained misdeed by the Advocates with their failure to file the Notice of Appeal within time and subsequently instituting the appeal within the prescribed time.

Thereafter, the applicants listed a series of application which they were actually filing and withdrawing. Even if I take those multiple applications as technical delay, still there remains a number of years under which the applicant had not been in courts of law to substantiate the grant. In my view, the time delayed is very inordinate, and there is no reasonable explanation which has been given to counter the principle. That being the case, there are no reasons furnished by the applicants explaining away all days delayed.

In the normal course, it was expected of the applicants to demonstrate what they were doing in the struggle to file a Notice of Intention to appeal, the expectation which they failed meet. In my opinion, the applicants have acted negligently, slop and in apathy in filing this application. Granting this application impliedly will encourage the multiplicity of unnecessary suits to the court rather than speeding up the matter.

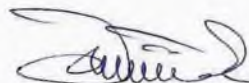
Regarding the ground of illegality of the decision, I would like to be guided by the decision of the Court of Appeal in the case of **Lyamuya**

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Construction Company Limited vrs. Board of Registered Trustees of Young Women's Christian Association of Tanzania, (supra) in which it was held in elaboration that;

*"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view be said that in VALAMBHIA's case, the Court meant to draw a general rule that, every applicant who demonstrates that his intended appeal raises points of law should as of right be granted extension of time if he applies for one. The Court there emphasized that, such point of law must be that **'of sufficient importance'** and, I would add that it must **be apparent on the face of the record, such as the question of jurisdiction, not one that would be discovered by long drawn argument or process.**"*

On the issue of illegality, the law is very clear as argued by the learned Counsel for the respondent that, for illegality to be good cause it must be of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction, not one that would be discovered by long drawn argument or process and it must be embedded in the decision sought to be challenged.



With all standard and measures, the illegality relied on in this application fall short of the principle enunciated in the case of Lyamuya Construction, as the alleged illegality was supposed to be raised in the probate and administration of the estate cause which had been concluded and closed. For the foregoing reasons, this application must fail for lack of merits.

It is hereby dismissed with costs.

It is order accordingly.

DATED at **ARUSHA** on 28th day of October 2022.




J.C. TIGANGA

JUDGE.